# DEBATES

IN

# BOTH HOUSES OF PARLIAMENT

ON THE

# LIBEL BILL.

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D. of Grafton

1792. # DEBATES

IN

of Great Britain and Ireland

## BOTH HOUSES OF PARLIAMENT

ON THE

# B I L L

INTRODUCED BY THE

## Rt. Hon. CHARLES JAMES FOX,

FOR REMOVING DOUBTS RESPECTING THE FUNCTIONS OF JURIES IN CASES OF

# L I B E L:

WITH THE QUESTIONS ADDRESSED BY THE HOUSE OF LORDS TO THE JUDGES THEREON, AND THEIR ANSWERS.

TO WHICH IS SUBJOINED,

## THE STATUTE.

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LONDON:

PRINTED FOR J. JOHNSON, ST. PAUL'S CHURCH-YARD.

M.DCC.XCII.


BRITISH MUSEUM

# DEBATES,

## &c. &c.

## HOUSE OF COMMONS.

FRIDAY, *May* 20, 1791.

MR. FOX roſe to make his promiſed motion, and began one of the moſt powerful ſpeeches ever delivered in parliament, by obſerving, that every member of that Houſe was no doubt ſo well acquainted with the duties of parliament and the ſpirit of the conſtitution, as to admit the propriety of an appeal to them, whenever any effort was required, for amending or reſtoring an important part of the law. It was the duty of that Houſe to watch the executive government in all the parts of its adminiſtration, and in no part certainly more than in the diſtri-

bution of juſtice. No words, he truſted, were neceſſary to ſhew that this fell within the ſphere of their rights, and that he was at leaſt guilty of no innovation in his preſent addreſs to them.

He alſo hoped, that no ſuch prejudice could ariſe as that he had any intention of defaming thoſe who were at preſent in the adminiſtration of juſtice. If it was to be held, or believed, that no error could be imputed to ſuch perſons without a deſign of involving them in a criminal cenſure, there would be an end to almoſt all applications of the preſent ſort; and the diſagreeable alternative would ariſe, of permitting the continuance of errors, which need only be mentioned to be perceived, or of requiring gentlemen to throw a perſonal imputation upon thoſe who might be perſonally worthy of every ſort of reſpect.

Upon this occaſion it was his deſign to call the attention of the Houſe to more than one point in the preſent mode of adminiſtering juſtice; but that which was the moſt material, was the conduct of courts of juſtice upon trials for libel. He ſhould trouble the Houſe with no general declamation upon the ſubject of the liberty of the preſs. It was ſufficiently known, that the ſecurity of any form of government, and the rights of any body of people, depended upon it; and he would therefore aſſume, that its importance would be as readily

dily admitted by all who heard him, as it could be aſſerted by him.

Mr. Fox aſſured the Houſe, that, fond as he was of the liberty, he was no friend to the licence of the preſs. But he was an enemy to proſecutions upon trivial occaſions, and to puniſhments diſproportioned to offences. With reſpect to the objections which he propoſed to make to the preſent mode of adminiſtering the law upon libels, it would be no anſwer to reply to him—Look at the licence of the preſs—ſee the daily increaſe of it, and the abuſe of that ſacred engine of liberty; abuſe, ſuch as tended to render men callous to public writings of every ſort. It was true, that the moſt ſacred characters might be vilified with impunity; and it was in the power of almoſt any man who could diſcover the weakneſſes or the errors of others, to hold them up to the contempt or the hatred of the public. Not only individuals, like himſelf, might be ſo treated; the characters of miniſters, of perſons in the higheſt and moſt reſpectable offices, might be attacked, under certain reſtrictions, with ſecurity.

But it was very doubtful whether any man could now freely ſpeculate upon political queſtions, the inveſtigation of which might be of the utmoſt importance to the conſtitution and the ſafety of the country. A man forming opinions upon the meaſures of government, or the ſtate of

affairs, could not, perhaps, ſafely deliver them, if they repreſented the conduct of government as dangerous, injudicious, or improper.

Mr. Fox ſaid, that, in his review of the ſubject, he ſhould proceed from particulars to generals, rather than from generals to particulars, as he thought that the moſt proper mode of illuſtrating it. Laſt year, during the fitting out of the armament, which appeared to be deſtined againſt Spain, a great deal of enquiry and ſpeculation took place relative to it. Both the importance and the ſingularity of the occaſion juſtified this; and ſo far from any ſurprize being excited by it, it would have been by far more remarkable if ſuch a period had been permitted to paſs without that ſort of notice. The country was then in danger, as it appeared, of being involved in a ruinous war with Spain; and it was very proper for thoſe who ſaw the danger, to warn their country of it.

For one of thoſe ſpeculations which had appeared in a newſpaper, the printer of it had been proſecuted. The man had injudiciouſly ſuffered judgment to go againſt him by default, and the ſentence which followed was beyond all doubt in his mind moſt inordinately ſevere. He could deliver more than his own opinion upon this ſubject, for he had converſed with many perſons even of the profeſſion of the law upon it, and al-

moſt

moſt every one agreed with him. There was certainly as general a diſapprobation of it as for many years had attended any deciſion of a court, and a general impreſſion that it was inordinate. The ſentence was pillory and impriſonment, and this for a publication, which, in his opinion, was not at all a libel in the way in which it was laid in the indictment.

It was a libel, indeed, upon the King's miniſters perſonally, and upon no other perſon or thing. If any man ſhould now ſay, that the conduct of his Majeſty's miniſters was totally deſtitute of prudence, policy, or ſpirit, there was no doubt that, truth being a libel, his aſſertions muſt be libellous. But would it be ſo aggravated or ſo dangerous a libel as to require ſuch a puniſhment? He admitted it to be a libel, but this was all which it was neceſſary for him to admit; and, in the preſent ſtate of manners, he ſhould not have believed that miniſters could have thought ſuch a libel of ſufficient importance to have ordered a proſecution upon it.

Mr. Fox profeſſed, that, upon technical points, he had always conſiderable diffidence in his own opinions; but he could not avoid declaring, that the information drawn upon this libel was unintelligible and incorrect.

*Innuendo*, he was of opinion, ſhould always be matter of explanation, not of addition, and ſhould

be affirmed by words equivalent to *id eſt, ſcilicet*, importing, and meaning. The word "meaning" was capable of two definitions. In one ſenſe, it might be ſtated in an indictment, that K—— meant *King*, for that words were ironically intended; and that the officer who was mentioned as *no* coward, was meant to be exhibited as a coward. In another ſenſe, a man may ſay he *means* to walk to-day, and this was not the ſenſe in which the word could be uſed to imply *innuendo*. The former meant the import of the words, the latter the intention of the writer, which ſhould not be mentioned as *innuendo*, the intention being deducible from the import.

In the third count of the information againſt Luxford, the word "meaning" was uſed; and in what ſenſe? Not as *importing*, referring to the *interpretation* of the words, but as referring to the *intention* of the writer, "meaning thereby to inflame the people of France." This error he thought material, and for the following reaſon:

It was thought by ſome perſons, that *innuendo* was matter for the judgment of the jury; by others, for the judgment of the court. Admitting the latter doctrine to be law, and it was certainly that at preſent received in the courts, the counſel for this man might ſay, that the inference was not properly ſtated. If this objection could be ſupported, as he was of opinion that it could, the

the court might then ſay—" But this does not come in the way of inference, but of innuendo, upon which the jury have already decided." If the counſel, upon a trial, had the matter been brought to a trial, took an objection to it as an innuendo, then it might be ſaid, referring to the ſubſtance, and not the manner of it, " This is not innuendo, but inference, of which the court is to decide."

As to the purport of the words, Mr. Fox contended, that it would be enormouſly oppreſſive, if a man, for declaring that certain meaſures might alarm the people of France, ſhould be held to have written them with the intention of exciting that alarm. They were a caution that France might be alarmed by certain meaſures, and their obvious purport was to prevent the continuance of thoſe meaſures.

Where the word " meaning," in an indictment, ſtood for *importing*, an innuendo was properly charged by it; where it ſtood for *purpoſing*, there it implied an inference. The difficulty, therefore, was, as he had ſhewed, how the information againſt Luxford could have been defended. Before the court, the word " meaning" might be called innuendo, and before the jury, inference; for, in point of ſubſtance, it was inference; in point of the form aſſumed in the information, it was innuendo.

Mr. Fox ſaid, that when the injuſtice of this caſe firſt ſtruck him, he conſidered how he might beſt prevent any ſimilar error in future. He could not complain of the judges; for, though no apprehenſion for himſelf ſhould ever prevent his complaint, if he believed them to have acted from any improper motives, he knew that nothing could be imputed to our preſent judges, but that ſort of error of judgment, to which all men were liable; and he had, therefore, no ground for ſuch a complaint. Yet he could not let the matter ſleep. When he, as a member of parliament, thought a man ſeverely puniſhed, he could not be ſilent, from any ſenſe of the difficulty which might attend his interference. He might have moved to addreſs his Majeſty for a pardon; but he underſtood, that the moſt material part of the ſentence, the pillory, was already pardoned, and the reſt was nearly elapſed.

He had then determined upon the preſent application, becauſe he was ſure that in the preſent inſtance, as in others, prevention was a better remedy than puniſhment. The doctrine of which he chiefly complained was, that the jury were not to be ſuppoſed capable of drawing an inference; that is, that thoſe who, as plain men, were to be allowed to fill up innuendos, which were ſometimes very difficult of explanation, could not perceive an inference, which certainly depended upon them.

them. It was about ſeven years ago that this doctrine was very publicly and powerfully aſſerted, upon the trial of the Dean of St. Aſaph; and the argument of his learned friend (Mr. Erſkine) in oppoſition to it, had been ſo maſterly and luminous, that nothing had been wanting to his glory but an oppoſition from *ſome perſon* to render it more conſpicuous!

Before he went into authorities, upon which the reſt of his caſe depended, he would notice the difference of opinion amongſt lawyers, as to the nature of the verdict which the jury might deliver in caſes of libels. Some lawyers held the verdict to be *ſpecial*, others *general*. The firſt man who brought the latter doctrine into play was John Lilburne, who, in the year 1649, ſaid the judges were *cyphers*, and that the jury were the judges both of law and fact: Judge Jermyn, indeed, had called this doctrine a *damnable and blaſphemous hereſy*; but the jury, who were the gods of this hereſy, had found Lilburne, their idolator, innocent!

Till of late years, this doctrine had not been much conſidered; and from the Reſtoration to the Revolution, the queſtion was kept out of ſight by the licence, without which, it was then the law, that all printing was libellous. But, with reſpect to it, he could declare, that his mind had been determined even *ex vi terminorum*. In trials for

libel,

libel, the matter could not be brought to iſſue upon any ſpecial plea, though the facts alledged were certainly of two ſorts, the publication of the words, and that they were ſeditious. The general iſſue muſt be pleaded, and there reſulted from it this ſoleciſm, that a man muſt be found guilty of the whole, when the jury even believed him innocent of that part upon which the reſt depended.

Was it thus that Engliſhmen were to be condemned, or that they were to condemn others? Was a man to be pronounced by his countrymen "Guilty," when they knew nothing but that he had publiſhed words, of which words they perhaps believed the meaning to be innocent? He found it, indeed, to be univerſally acknowledged, that the jury, if they pleaſed, might find a verdict of "Not guilty;" but, though the poſſeſſion of a power moſt certainly implied the right to exerciſe it, Judge Aſhurſt, a very moderate man, had ſaid, "To be ſure they might find ſuch a verdict, though they believed the fact of the publication; and ſo *might* a highwayman come and place a piſtol at the breaſt of a traveller." Here, then, was a confeſſion of *univerſal power*, with a declaration that there was no *right* to exerciſe it!

It had been laid down as a rule, *Ad quæſtionem facti non reſpondet curia: ad quæſtionem juris non reſpondent juratores.* But in trials for murder, which, like libel, was certainly a compound of fact

and law, the judges even inſtructed the jury to find both; in caſes of felony they did the ſame, and libel alone was the anomaly, in which it was abſurd for the jury to think of law.

Mr. Fox, after alluding to Lord Mansfield in terms of very high reſpect, noticed his doctrine, that the verdict of the jury in caſes of libel, was in the nature of a ſpecial verdict; ſo that what was always held to be a matter of choice, was thus treated as a neceſſary part of their duty, and ſhewed in a very ſtrong light the abſurdity of allowing judgment to follow upon a ſpecial verdict, which threw the *onus* of producing proof of innocence upon the priſoner—a practice contrary to every known law in the world.

One other general argument, not depending upon authority, was, that, upon a trial for libel, the counſel for the proſecution may ſet out the enormity of the caſe, and uſe their eloquence in aggravating the offence before the jury; which was abſurd, if the priſoner was then before perſons not capable of judging of the nature of the libel, and competent only to the fact of publication. It had been held, that this was proper in order to ſatisfy bye-ſtanders; and, according to Lord Mansfield, even judges might practiſe it. So that ſpeeches were directed to the jury, repreſenting the heinouſneſs of the offence before them, while it was denied that they had any right to

judge

judge of it!—It was alſo to be obſerved, that evidence might be offered to the jury to rebut what had been produced in ſupporting the preſumption of guilt; yet it was ſaid, that they might judge of the *relative* evidence, but could not take cognizance of the *original!*

In the caſe of the king againſt Vere, there was a difference perceptible between the two other judges and that of Lord Holt; and in that of the king againſt Cutchins, Lord Holt had even referred the meaning of the words to the jury, by ſaying—"Can you think that the uſe of ſuch words is not libellous?" Lord Raymond, indeed, in 1731, had delivered an opinion directly contrary to that which was here implied; and it was from this period, that the preſent doctrine took its date. But even Lord Mansfield, in the caſe of the king againſt Horne, had virtually forſaken it, and become inconſiſtent with himſelf, by ſaying to the jury—"You will judge whether that is an arraignment of the government; if it be a *criminal* arraignment, you will find "Guilty." His learned friend has urged this caſe, upon the trial of the Dean of St. Aſaph; and it was *one of thoſe* which had not been anſwered. If great men were thus inconſiſtent with themſelves, it was probable that the inconſiſtency was inherent in the doctrine which they had imbibed in the early part of their education, and thought themſelves bound to defend.

There

There was another point in which this doctrine was to be conſidered. In an indictment for high treaſon, if the overt act was the publication of certain words, all the doctrines relating to libel would apply to the trial of that indictment. The jury might find the publication of the words, and the judges might determine their meaning. Here then was a caſe where the life of a Britiſh ſubject was dependent, not upon a jury of his fellow ſubjects, judging upon the circumſtances of the caſe, but upon four lawyers, ſtudying, in their cloſets, the inferences of law.

Mr. Fox then alluded to a judgment of the court of Star-chamber, and ſaid, that upon trials for threatening letters, where the law was ſaid to be ſimilar to that upon libels, the practice was different, Judge Hotham having directed a jury to enquire *quo animo* the letter was written. To all theſe abſurdities and circumſtances of injuſtice he felt himſelf unable to propoſe any remedy, and he had recourſe to the wiſdom of the Houſe to ſupply it. A grand committee, he hoped, would be appointed, who would examine what the law was, and judge what it ought to be. The mode which he ſhould recommend, would be to paſs a declaratory law; or if any doubt was entertained as to that, a reſolution might be adopted, which ſhould ſettle the law without referring to paſt caſes. He ſhould wiſh alſo to move

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ſome reſolution, declaring the ſenſe of the Houſe as to the particular caſe of the king againſt Luxford; but if this, or any other part of his plan was diſapproved, he begged that it might be amended into perfection, and not wholly rejected for its errors.

Mr. Fox then again noticed the abſurdity of conſidering verdicts in caſes of libel, as ſpecial verdicts, while the judges would not receive them without the word "Guilty." If the jury attempted to find a verdict without it, the court would ſay to them, "Give us this word." They would demand the word which made the verdict *general*, and yet they would only receive it as *ſpecial*.

Upon his other ſubject—Informations in nature of *quo warranto*, he contended very forcibly, that the rule lately made in the court of King's Bench for reſtricting the granting them to private perſons to the period of ſix years, inſtead of twenty, put it into the power of the attorney-general, to whom there was no limitation, to diſfranchiſe all illegal corporators who might be obnoxious to the crown, while private perſons had no remedy againſt the corporators, whom the attorney-general might not chooſe to proſecute. The effect of this upon elections was extremely obvious, and it was neceſſary to apply a remedy by ſtatute.

Mr Fox ſaid, that hitherto he had omitted a very popular topic, the reprobation of the doctrine,

that

that truth was a libel; the oppoſition to which had, indeed, been very much promoted by the paradoxical ſtatement, that the greater was the *truth*, the greater was the *libel!* There appeared, at firſt ſight, to be ſome inconvenience, whichſoever way this queſtion was determined; for it certainly was not to be endured, that any man, being informed of ſome weakneſs or failing of another, or his family, which it was ſo much the intereſt of the public that the latter ſhould forget, might render his life wretched, by perpetually diſplaying it to the world for malicious purpoſes, and without any view to public good. Yet, if any perſon thought that a miniſter, or any public man, had been guilty of a public offence, ſuch as wilfully deluding the parliament; if that perſon could bring proof of his aſſertion, it was proper that the aſſertion ſhould be made, and that the proof ſhould be admitted in juſtification of it. He did not wiſh to clog any bill which might be brought into parliament upon the ſubject; but it was his opinion, that in trials for ſuch publications, the jury ſhould receive not only evidence of the truth of the words, but alſo of the intention with which they were publiſhed. If this was private malice, they ſhould find a verdict of "Guilty;" if a laudable view of benefiting the public by information founded in truth, as to public affairs, then a verdict of "Not guilty."

Since

Since it had been the faſhion to run ſo much into abſtract ſpeculations concerning the conſtitution, it had been his endeavour to confine his attention to two great points, upon which all the reſt depended.

Of theſe he would never loſe ſight; and if he ſhould ſucceed in ſecuring them, the other parts could never be injured. He then ſpoke with great reſpect of the late Serjeant Glynn, whoſe motion he ſhould now adopt, though he had oppoſed it when made, from an opinion that the courts of law had not ſufficiently reprobated the conſtitutional doctrine upon libels, to require any interference of parliament then. This opinion he now perceived to have been improper; for it was the duty of parliament to interfere upon the firſt alarm, and prevent the occaſion for a greater. Since the caſe of the dean of St. Aſaph, the doctrine to which he objected had been avowed by all the judges, except, indeed, that in the trial of the cauſe—the king againſt Topham—where were ſome ſentiments in the ſpeech of the worthy Chief Juſtice of the King's-Bench, which raiſed a hope that his opinion was ſomewhat contrary.

When the caſe of the king againſt Luxford occurred, he had forebore to notice it at firſt, leſt it might be ſuppoſed that he acted from immediate warmth, and leſt the diſcontent which he ſaw ariſing ſhould be dangerouſly increaſed. The preſent moment,

moment, he hoped, was favourably choſen. In a committee, ſuch as he had propoſed, gentlemen might object to ſuch parts of his plan as appeared to be unſuitable, and offer ſuggeſtions of their own which might improve them.

By the poor organ of his voice, he called upon the Houſe to watch over and preſerve the conſtitution; a call which would have been made ſooner, but that, after he had thought it neceſſary to poſtpone his motion for ſome time, on account of the temper of the moment, he had been influenced by another motive of a more private nature. He had a hope, and indeed a confidence, that the good ſenſe of the country would reſtore his learned friend to parliament; and he wiſhed that his ſupport might crown the work, which he had ſo nobly, though unſucceſsfully begun elſewhere.

Mr. Fox then moved, "that a grand committee upon courts of juſtice be appointed to ſit on Tueſday next."

Mr. Erskine

Roſe and ſeconded the motion; and before he ſat down, he ſaid he ſhould ſtate a few of the reaſons which induced him ſo to do: he believed it would be unneceſſary to acquaint the Houſe, that he ſhould treſpaſs any time on their patience, after the very able ſpeech that had been juſt delivered on the ſubject. Had he merely

read the outlines of that ſpeech, he was free to confeſs, that it would have made him not a little vain, indeed, to find that the opinion which he had advanced on the trial of the dean of St. Aſaph coincided with that of his right honourable friend; but as he had the happineſs of being preſent, and heard it delivered, he was as free to confeſs that it had a contrary effect. He wiſhed his honourable friend had confined himſelf merely to the general queſtion of the doctrine of libels, and paſſed over that of Mr. Luxford; though he was ready to confeſs that it was not on account of an individual that he expreſſed that wiſh, but the circumſtances that were coupled relative to the court which pronounced that ſentence, and to whoſe character he was certain his honourable friend bore the higheſt reſpect. On this Mr. Erſkine entered into a juſtification of the characters of the judges, and inſiſted that the doctrine of libels at this day was ſuch, founded in precedents and adjudications, that it was impoſſible for the judges to go back from the ſteps of thoſe who had gone before, much leſs in their own, without a charge of inconſiſtency, which of all things ought to be avoided. In order to ſhew that theſe aſſertions were founded in truth, he felt himſelf induced to take a ſhort retroſpect of the preſent practice, and the different opinions which had been entertained on the ſubject by the cleareſt heads and

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the beſt hearts. Having illuſtrated theſe points by a great diſplay of legal reading, he proceeded to point out the difference betwixt civil and criminal caſes, for the purpoſe of ſhewing the power of the judges in one, and the people in the other. The judge was the repoſitory of the rules of law. In all civil caſes, if a man felt himſelf injured, he had but to open a book, and ſee how far that injury entitled him to an action:—he preferred his complaint to the court—the defendant was cited—if he did not appear to juſtify, the court with great propriety conſidered the non-appearance *pro confeſſo*, and ſigned judgment accordingly. In criminal caſes, the party injured ſubmitted his injury to the grand jury; if they thought that it contained a ſufficient ground of grievance, it was ſent to be tried by twelve men. From theſe two circumſtances with regard to the mode of procedure, it was plain that it was conſtitutionally intended that criminal and civil caſes ſhould be kept aſunder; the one originated with the judge, and the other with the people: the grand and petty jury were wiſely intended as a twofold barrier betwixt the people and the crown: the houſe of commons was the repreſentative of the people, and it was undoubtedly their duty to watch over their privileges; that Houſe was one of the great balances of the crown, the key-ſtone of the judicial

arch; and juries the commons of the judicial ſyſtem. In caſes of property, the judges, as he had already obſerved, were the grand repoſitories of the rules of law, and the law itſelf, and for the beſt of reaſons: property was of a complex nature, ſo that it was not expected that a jury ſhould be competent in every point.—Reputation was alſo a property, and the moſt ineſtimable; but it was a property which every man was ſuppoſed to be a judge of; and therefore the violation was claſſed in the criminal law, which originated with the people, and of which the people were allowed to be competent judges. Having defined and ſettled the limits of theſe two branches according to law, and, we may add, reaſon, he declared that they were as oppoſite to each other as day is to night; or, as his hon. friend (Mr. Fox) expreſſed, that they differed *toto cælo*; the one originated with the judge, the other with the people. A new trial could be moved, and granted to the one; but if the jury acquitted, the judge had no farther power.

Mr. Erſkine exemplified the firſt in ſeveral actions, and the ſecond in caſes of murder, felony, &c. The judges could give their opinion to the jury in criminal caſes, and he did not wiſh to debar them of giving their advice in caſes of libels. This led him to divide libels, as they now ſtood, into three parts, and the preſent mode of proceeding under

under each of thoſe heads :—the firſt was maintained by a civil action, where it was conceived that one man had injured the reputation of another; the damages which the plaintiff ſuppoſed he had ſuſtained were laid in his declaration, and the jury judging of the *quo animo*, aſſeſſed the damages accordingly :—the next was by indictment, and differed very little in the cauſe of action from the firſt:—the third was what his hon. friend called ſeditious libels, which tended to excite tumults, and to diſaffect the minds of the people to government: the tendency of the latter was truly alarming indeed; but he would appeal to the Houſe, if the doctrine of adjudication, adopted on the occaſion, was the beſt, either to extinguiſh thoſe writings, or to conciliate the affections of the ſubject : for the firſt there was a poſitive rule of law, but for the laſt he did not ſee there was any; for, could it be ſuppoſed that a judge could decide on the effect of the one, with the ſame preciſion that an individual could upon his own caſe? The point principally aimed at by Mr. Erſkine, was to ſhew that the doctrine of libels, as it exiſts at preſent, was not conſonant to the conſtitution, and that judges ought not to be cenſured for their deciſions; but that it was the duty of that Houſe to enquire into the principles of the conſtitution, on which it was originally founded; to bring it back to thoſe principles, which would be no ſmall

acquiſition to the conſtitution, ſave the judges a great deal of trouble, enable them to proceed with all that purity of intention which characteriſed all their proceedings where the law was direct and poſitive, and where they were not left to reſort to precedent, which was daily accumulating. The trial by jury was one of the main ſprings of the conſtitution; and in order to reſtore the elaſticity of that ſpring, it was neceſſary to inveſt a jury with all the rights to which that ineſtimable bleſſing was entitled, in order to prove that thoſe rights were invaded in this very important reſpect. After a ſhort, but very beautiful eulogium on the preſs, he obſerved, that on the revival of letters, the ſtate made a very particular point of the preſs: prerogative, and clumſy preſcriptions, began to feel the effect of its powers; and they conceived that the beſt means of daſhing down the riſing ſun, would be to inſtitute the Star-chamber, where the judges decided without jurors; he begged gentlemen would attend to that very intereſting point of hiſtory:—Light enough, however, had juſt iſſued from that great medium of communication, to enable the people to take a tranſient view of the ſymmetry and movements of the conſtitution; the effect of which was, that the Star-chamber was at length aboliſhed. Now, for what end was the ſtruggle made to pull down that infamous court? Was it under an opinion that the judges would

execute the laws, or diſpenſe juſtice, with greater integrity in Weſtminſter-hall, than in a private room?—Certainly not; no, the exertion was made in favour of a reſtoration of the trial by jury in the caſe of libels. He then proceeded to ſhew the effect of a jury in thoſe caſes.—In the trial of Penn and Mead, two quakers, before the recorder of London, theſe two men were charged with preaching ſeditious doctrine to the people: the jury brought in a verdict of ſpeaking to the people; the recorder ſent the jury back, the reſult of which was, that they acquitted the priſoners. One of the jurors, who might well be compared to Hampden, was fined in ſo many marks; which he refuſed to pay, not becauſe he was not able, but becauſe, like Hampden, he thought the conſtitution of his country would be injured in ſubmitting to what he conceived, and properly, an arbitrary impoſition of the judge: in conſequenee of which he appeared in the court of King's Bench by habeas corpus, before judge Vaughan, where he was acquitted by his peers, notwithſtanding the direction of the judge. This ſingle circumſtance gave birth to a law which has indemnified jurors ever ſince with regard to their deciſion.—The next caſe was the trial of the ſeven biſhops, for preſenting a petition to James the II. couched in terms of the utmoſt reſpect and loyalty. The court complaiſance of the judges in thoſe days

was ſuch, that they pronounced that paper a libel. The trial was at bar, and what was the conſequence? Notwithſtanding the corruption of the judges, they were ſtill ſo far ſenſible of the rights of the ſubject, that they ſummed up what was deemed the libellous part of the paper to the jury, and ſeverally gave their opinions on it. Judge Wright ſaid he thought it was a libel; judge Holloway of the ſame opinion;—but when it came to judge Powel, he declared, that, in his opinion, it was alſo a libel; but, added he, gentlemen of the jury, the iſſue of that reſts with God and your conſcience; the effect of which was, that the jury acquitted thoſe venerable fathers. Here the ſun of the conſtitution, ſo long clouded, burſt forth in all its glory, and plaudit ſucceeded by plaudit reached the appalled ſoldiery of James, whoſe knees ſmote each other at the patriotic ſound.—The learned gentleman adverted to the trial of the dean of St. Aſaph, and recapitulated a few of the leading arguments which he had advanced in favour of his client on that occaſion, and the authorities which he drew from Holt, Forſter, &c. in ſupport of thoſe arguments. Having paid many compliments to Lord Mansfield, he ſtated the authorities which were adduced in anſwer to what he had urged; the authority indeed was rather ludicrous, but it ſhewed the ſtraits to which they were reduced: the only authority then was a line from an old ballad, to the tune of

Packington

Packington Pound. On this he read the ſtanza, the laſt line of which was, ſpeaking of juries,

"And judges of fact, though not judges of law."

Mr. Erſkine inſiſted, that in the original it ran,

"And judges of fact, as well as of law."

The learned gentleman touched on ſeveral of Mr. Fox's arguments, in which he concurred, and ſome of which he illuſtrated with caſes from the beſt law-writers. He alſo dwelt for ſome time on the ſtatute of Edward the third, with regard to high treaſon, in order to ſhew that the preſent doctrine of libels extended to that act, the danger of which he pointed out in the moſt forcible manner. Having ſtated all thoſe points, his next ſtep went to ſhew that it was the intereſt of government to concur in the preſent motion.—It was in vain to talk of the excellence of any conſtitution, unleſs the people felt the effect of that excellence; and in proportion as they felt, in proportion they would be attached.—The motion in queſtion went directly to that object. The trial by jury was the balance of monarchy. Take the former away, and the latter would cruſh the people to powder. The preſent doctrine ſet the judge and the jury at variance. The preſent motion, if adopted, would reſtore that harmony and union which ought to ſubſiſt between them. Law and fact would thus be happily tempered, and by this means the Britiſh

conſti-

conſtitution would be reſtored to that vigour and energy for which we were ſo highly indebted to the wiſdom of our anceſtors.

The Attorney General

Said, that the mode that was propoſed by an hon. gentleman (Mr. Fox), for regulating the law with reſpect to libels, did not perfectly accord with his ſentiments; and what had fallen from the hon. gentleman (Mr. Erſkine) who ſeconded the motion, ſtruck him in a very forcible manner, and it was, that if that hon. gentleman was now upon the bench, he would find a great difficulty in delivering a charge to the jury in a manner different from that which was now preſented; the law depended upon experience, and there was a great danger in altering it by deciſion; the directions that were given by the judges now, with reſpect to the law of libels, went to keep invariable the records that were handed down to them by their predeceſſors; and if the mode propoſed, with reſpect to fixing the law of libels, were to be adopted, it would, in his opinion, tend to create a great alarm in the minds of ſeveral. He then paid many compliments to the ability and integrity of a noble earl (Mansfield) who preſided ſome years ago in the King's Bench, and to the noble lord (Kenyon) who had ſucceeded him, and who moſt ſincerely deſerved the appellation of an honeſt man; and thought it extremely

tremely imprudent that their deciſions ſhould now be called into queſtion; there was no neceſſity for a committee previouſly to ſit upon the diſcuſſion of the queſtion, if ſuch advantages as were pointed out, were to reſult from it; he conſidered it as moſt unqueſtionably the caſe, that the jury were to determine upon the preciſe ſtate of facts, which deciſion was ſubject to a new trial, or a writ of error. To make the law as certain as poſſible, was a very great object; but he could not conceive any neceſſity there was for the Houſe to go into a committee in that caſe. He ſaw alarm and danger in ſuch a mode of proceeding. It might, he ſaid, go out in the world, that the conduct of the judges was called into queſtion now. He thought the leſs perilous, and the moſt conſiſtent and regular method would be, for the hon. gentleman to move for leave to bring in a bill to regulate that which they formed in their minds to be neceſſary. The hon. gentleman then went into the nature of a franchiſe: he thought the term of twenty years too much; and whether the period of ſix years was right or not, he would not take upon him thus to determine; but he ſaid, ſhort and deliberate attention ſhould be paid to all fellow corporators. He then went pretty much at large into the expoſition of the libel for which Luxford was convicted. He pointed out the dangerous tendency of it, with reſpect to ſtirring up the French nation againſt Britain;

Britain; and not only that, but endangering the lives of thoſe Britiſh ſubjects who were then reſident in France. The paſſage which was conſidered libellous, was diſſeminated through the French papers; but that was no juſtification of his proceeding againſt the printer, for it was *ex poſt facto*: it could not be conſidered that government bore hard upon the preſs; for, he ſaid, within the laſt thirty years, ſeventy were only proſecuted for libels, fifty-two of whom were convicted, which plainly ſhewed that juries were not diſſatisfied with the manner of proceeding: and, within theſe thirty years, he ſaid, ſeven were ſentenced to the pillory, two of whom were for libelling the Ruſſian ambaſſador, by accuſing him of ſtock-jobbing; and the reſt for libelling his Majeſty, or ſome of the royal branches. It has been ſtated, that a proſecution had been carried on againſt Luxford in a very erroneous way; if that was the caſe, he muſt confeſs he had erred moſt egregiouſly, for he thought it his moſt indiſpenſible duty to ſuppreſs all ſeditious libels, and to puniſh the publiſhers of ſuch: theſe were the reaſons he had to offer to the Houſe. He concluded with expreſſing his diſapprobation of the mode of regulation propoſed by the honourable mover.

MR. JEKYL

Said, that after the two very eloquent ſpeeches that

that had been made by the hon. mover and ſeconder of the motion, he could not be induced to think, unleſs ſome weightier arguments than what he had yet heard ſhould be advanced, that if there was any impropriety in going into a committee, it could not be conceived that it was for the purpoſe of criminating the judges ; no, it was expreſsly diſavowed by the Houſe : the purport of it was for fixing the law, and therefore he would vote for going into a committee.

MR. PITT

Said, if there was a general concurrence manifeſted by the Houſe, there could not be a difference in the mode of bringing forward the meaſure. What was or was not the province of a jury, he did not wiſh to agitate then. He then alluded to the venerable age and abilities of a noble and learned earl (Mansfield), who for a long period of years preſided in the King's Bench, and whoſe opinions were not to be called into queſtion. What the Houſe had to decide was, not what is or has been law, but ought to be law ; and he could not conceive that a libel ſhould not go to be decided by the unfettered judgment of twelve men. He concurred moſt cordially in moſt parts with the hon. gentleman who made the motion ; but he thought it would be the moſt ſimple and conſiſtent

mode

mode to move for leave to bring in a bill for fixing the caſe of libels.

MR. FOX

Paid many compliments to the very candid manner in which the honourable gentleman (Mr. Pitt) ſpoke, and ſaid he would conform to the mode propoſed by the hon. gentleman, if he would inform him by what means he could obtain a copy of the information that was filed againſt Luxford, and alſo his ſentence.

MR. PITT

Said he might move for a copy of each.

MR. FOX

Thanked the hon. gentleman, and moved for leave to withdraw his motion; which being granted, he then moved "for leave to bring in a bill to remove all doubts reſpecting the rights and functions of juries in criminal caſes;" which being ſeconded, he then moved "for leave to bring in a bill to explain and amend the act relating to the proceeding by *quo warranto*."

The motions were then ſeverally put and agreed to, and the Houſe adjourned at twelve o'clock.

HOUSE

## HOUSE OF COMMONS.

WEDNESDAY, *May* 25, 1791.

MR. FOX

Brought in his bill declaratory of the rights of juries.

The bill was read a firſt time.

MR. FOX

Moved that the bill be read a ſecond time.

MR. MITFORD and the ATTORNEY GENERAL

Were of opinion, that on a bill of ſo much importance, gentlemen ſhould pauſe before they gave their aſſent to its ſecond reading: they both entreated gentlemen to give the bill a moſt ſerious attention.

MR. ERSKINE

Saw no neceſſity whatever to pauſe; but had no objection to a pauſe that might not, in the buſineſs of the ſeſſion, prove fatal to the bill. He argued a ſhort time upon the rights of juries to decide by general verdicts in all criminal caſes, amongſt which he claſſed the offence of a libel.

MR. FOX

Mr. Fox

Expreſſed his ſurpriſe at an oppoſition to the ſecond reading, when the Houſe had been unanimous in the leave granted to bring it in. The day he propoſed for the ſecond reading was Friday (27th), and the committee for the next week. He wiſhed the bill to be printed.

The queſtion was then put and agreed to, that the bill be read a ſecond time on Friday, and printed.

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## HOUSE OF COMMONS.

Tuesday, *May* 31, 1791.

The Houſe having reſolved itſelf into a committee on this bill,

Mr. M. A. Taylor was called to the chair.

The Solicitor General, Sir John Scott,

Propoſed as an amendment to the firſt enacting clauſe, the inſertion of words to the following effect:—That with the aſſiſtance and direction of the judge in all matters of law, the jury ſhould give, if they thought proper, a general verdict of Guilty, or Not guilty, upon the whole matter put in iſſue upon the indictment.

This

This gave riſe to a very long but unintereſting converſation; in which Mr. Fox, Mr. Bragge, Mr. Harriſon, Mr. Erſkine, Mr. Bearcroft, Mr. Serjeant Watſon, and other gentlemen oppoſed the amendment, and propoſed others in its ſtead. The ſolicitor general at length withdrew his amendment, and offered a proviſo in nearly the ſame words, which after a further converſation was agreed to.

Upon the clauſe for empowering juries to decide whether a publication was a libel, or no libel, Mr. Morris oppoſed it moſt ſtrenuouſly, contending, that libel or no libel was a matter of law, and that the jury ſhould in ſuch caſe always conſider themſelves bound by the opinion of the judge.

The CHANCELLOR of the EXCHEQUER

Replied, contending, that juries were as capable, and as much warranted by right, to decide on ſuch caſe, as on any criminal charge whatever.

After much further converſation, in which the gentlemen of the long robe took part, the bill was gone through with.

The report was immediately brought up and received—the bill ordered to be ingroſſed—and to be read a third time the next day.

WEDNESDAY, *June* 1, 1791.

There being only twenty-ſeven members aſ-

ſembled at four o'clock, the ſpeaker adjourned till the next day.

THURSDAY, *June* 2, 1791.

After a few words from Mr. Mitford, the Attorney General, Mr. Jekyll, the Maſter of the Rolls, and Mr. Fox, this bill was read a third time and paſſed.

HOUSE

# HOUSE OF LORDS.

WEDNESDAY, *June* 8, 1791.

LORD STANHOPE

HAVING moved the order of the day for the ſecond reading of the bill for removing doubts reſpecting the rights and functions of juries in criminal caſes:

The LORD CHANCELLOR

Left the woolſack, and ſaid—The only objection he had to the bill was, that the purpoſe of thoſe who had introduced the bill, was not anſwered by it ſo fully as they wiſhed: but when he conſidered the preſent ſtate of the ſeſſion, the magnitude and importance of the bill, the circumſtance of the law of libels having been fixed and ſettled for ſo many centuries, and of there being an intention to make an alteration in that law; he conceived it to be a ſubject deſerving much more attention, and much more deliberation than their lordſhips could poſ-

ſibly beſtow on it in the courſe of the preſent ſeſſion: and therefore, although the bill in its principle met with the concurrence of all thoſe noble and learned friends with whom he had converſed on the ſubject, his lordſhip ſaid, he ſhould only move, that the bill, inſtead of being read a ſecond time then, ſhould be read a ſecond time that day month.

LORD STANHOPE

Expreſſed his aſtoniſhment at the noble and learned lord's having made ſuch a motion, without having ſtated a ſingle objection, a ſingle doubt, or any one reaſon for his moving to put off the bill for a month, which was in fact nothing elſe but in other words to negative it. His lordſhip obſerved, that if he knew the learned lord was a friend to the bill, or to the principle of it, or if the noble and learned lord had alledged a reaſon why he wiſhed it to be put off till that day month, he ſhould have ſeen it put off with much leſs diſſatisfaction; but without adducing one argument, one reaſon, to move to poſtpone one of the moſt important bills to this country, inaſmuch as the liberty of the preſs and the rights of juries were concerned, was to him matter of perfect aſtoniſhment. Their lordſhips, he ſaid, muſt protect the people of this country from ſuch arrogance, and ſuch uſurpation as had been frequently exerciſed

by

by judges in their conduct towards juries, in the directions which they had preſumed to give them. In ſaying this, his lordſhip begged it to be underſtood, that he was not ſpeaking of the conduct of the preſent judges; he did not mean to cenſure them becauſe they had thought it their duty to follow certain precedents; he was, his lordſhip declared, ſpeaking of the perſons who had ſet thoſe precedents in former ages, and in former times: he did not blame the preſent judges for following precedent; though, were he a judge, he ſhould not, his lordſhip ſaid, think himſelf bound to follow precedents which appeared to him to be unjuſt and profligate.

The hon. and learned gentleman (Mr. Erſkine), who had ſeconded this bill in another place, had not, his lordſhip obſerved, heſitated to ſtate, that if he had been a judge, he ſhould have thought himſelf bound to decide as the preſent judges had done in the caſe of libels. The queſtion, his lordſhip ſaid, was neither more nor leſs than this:

Whether they were to have any trial by jury, or whether they were to have a juriſdiction as deteſtable as the Star-chamber itſelf? To aſſert that it was ſufficient for the jury to find the fact of publication, and the ſenſe of the thing publiſhed, and that they ſhould not decide the law, the criminal in-

tention, was to deſtroy trial by jury, root and branch.

Four points, his lordſhip obſerved, ought to be decided by the jury. 1 The fact of the publication. 2. The ſenſe of the thing publiſhed. 3. The law which made it criminal, for there was nothing criminal if no law was againſt it. 4. Whether the act was done with a criminal intention?

He ſhould, his lordſhip ſaid, give one inſtance, and one would be as good as ten thouſand. Suppoſe, ſaid his lordſhip, a man were bound neck and heels, and a perſon were to pour down his throat any liquor of an intoxicating quality, and that a ſeditious paper were put into the man's hands, and by him diſtributed throughout the country; that paper might be a ſeditious libel; but, inaſmuch as there was no criminal intention in this man's conduct, no one, his lordſhip preſumed, would ſay there was any guilt. His lordſhip ſaid, he gave this inſtance, in order to ſhew that a criminal intention muſt be proved.

Criminal intention, he obſerved, conſiſted of two parts: 1. the intention of publiſhing a thing; and 2, the criminality of the thing publiſhed. It was neceſſary that thoſe two things ſhould be united, in order to conſtitute criminal intention: it was neceſſary that a thing ſhould be publiſhed, and that that thing ſo publiſhed ſhould be criminal.

It appeared to his lordſhip, that the leaving theſe things to be decided by the jury, was what conſtituted the difference between this country now, and at the period when it was governed by the Star-chamber; it was that which made the difference between this country and thoſe countries where tyranny was exerciſed, and deſpotiſm prevailed. If then the bill before their lordſhips were fit to be rejected, the learned lord ought to have ſtated his objections, and aſſigned his reaſons: but he had done neither, and till reaſons were ſtated, his lordſhip declared he ſhould ſay no more on the ſubject.

The Lord Chancellor

Then put the queſtion on his own motion, when

Lord Camden

Roſe and ſaid—He underſtood it to be the wiſh and deſire of the noble and learned lord, that this bill ſhould be poſtponed, in order that it might receive a fair and full conſideration. He ſaid, he himſelf, conſidered as a ſingle individual, ſhould be very far from agreeing to poſtpone the bill, if it were done for the expreſs purpoſe of rejecting it altogether: but if more time was aſked, merely that they might have a better opportunity of deliberating upon the ſubject, he for one ſhould have no objection to the motion. After the paſſ-

ing of the bill, the law of the land would ſtand juſt where it did before the bill was brought in.

His lordſhip ſaid, he would venture to affirm, and ſhould not be afraid of being contradicted by any profeſſional man, that, by the law of England as it now ſtood, the jury had a right, in deciding on a libel, to judge whether it was criminal or not; and juries not only poſſeſſed that right, but they had exerciſed it in various inſtances. If a jury, notwithſtanding of any direction from a judge, were to acquit a defendant in the caſe of a libel, that acquittal would ſtand againſt all the power in this country till the preſent law was changed. On the other hand, if a jury found a defendant guilty, that verdict would ſtand, unleſs the court would ſay, the libel was not of a criminal nature, and ſhould think fit to arreſt the judgment.

With regard to thoſe papers called ſeditious libels, there had been a variety of opinions; and his lordſhip ſaid, that, as a matter of delicacy, he ſhould not then enter into thoſe opinions: but he conceived, that the principal cauſe of complaint reſpecting libels had been owing to the directions of ſome judges, who had told juries, if they found the publication and innuendos, they *muſt* find the defendant *guilty*. Some judges had told the jury, "You have nothing to try but the publication and innuendos;" and his lordſhip contended, that, if the jury did find the defendant guilty, under that

conduct

conduct every puniſhment followed in conſequence of it:—the pillory, loſs of ears, fine and impriſonment, &c. If the jury found a ſpecial verdict, their conſciences would be often relieved. That would be the caſe, if they were only to find certain facts, and leave thoſe facts where they ought to be left, with the court, to determine what ought to be the inference.

The jury by a ſpecial verdict ſaid, "We are ignorant of the law upon the facts we have ſtated; we do not know the concluſion that ought to be drawn from ſuch or ſuch facts, and therefore deſire the aſſiſtance of the court; and if the court ſhould determine that ſo and ſo is the law, then we find ſo and ſo." But in the caſe where the jury took the matter upon themſelves, the whole lay upon their conſciences. He thought the direction to the jury, that they were only to attend to the publication and innuendos, to be extremely hard, and what he had always thought contrary to the law of the land. Of old, if juries found a wrong verdict in civil caſes, they were liable to an attaint. It was otherwiſe in criminal caſes. If their lordſhips meant to bring in a bill to ſay, that the caſe of libels ſhould not reſt with the jury, they would ſpeak out and declare, that it ought to reſt with the judges. It muſt remain either with the judges or the juries. At preſent, he conceived it was the province of the jury.

His

His lordſhip obſerved, as thoſe papers which were calculated to amuſe and inſtruct the public, might be publiſhed with innocence; ſo, on the other hand, thoſe papers which were only calculated to ſcandalize the king and his government, deſerve the moſt ſevere and exemplary puniſhment. The licentiouſneſs of the preſs was an abomination; they felt it daily, and they could not repreſs it: but the reaſon why they could not repreſs it, was only, in his lordſhip's opinion, becauſe the law was not well underſtood. If papers contained no more than innocent animadverſions on the king's miniſters, and on the government; and if they contained uſeful information to the people, if they opened their eyes, and pointed out clearly their rights and privileges; his lordſhip ſaw no reaſon why ſuch papers ſhould not be publiſhed.

Some judges had ſaid, that every calumny on the king's miniſters, and that every thing that reflected on adminiſtration, was a libel. But their lordſhips gave their power in theſe caſes to the judge, or to the jury; for they muſt give it to one of them, and the law had given it to the jury. The only queſtion therefore was, whether their lordſhips would change the law, and would give it to the judge? But his lordſhip contended that the law was not changed by this bill; it was only declared.

More time was wanted in order to obtain a more accurate deſcription of thoſe things which involved the liberty of the preſs, and on that account the ſubject became of great conſequence; and therefore a larger time to conſider of it might be proper. In the caſe of a ſpecial verdict, there naturally muſt ariſe doubts; which doubts muſt be ſtated by the judge, and the ſpecial verdict muſt be concurred in by the counſel on both ſides. Lord Coke had been very preciſe on the ſubject. That great judge had laid it down, that a ſpecial verdict could not be found, either where the law was known and determined, or where there was no law; but only in the caſe where the law was doubtful.

LORD HARDWICKE

Said a few words on the ſubject; and if we underſtood his lordſhip rightly, for we heard him rather indiſtinctly, he ſpoke in favour of the bill, and declared that he would rather paſs the bill imperfect as it might be, than poſtpone an object of ſo much importance.

LORD LOUGHBOROUGH

Said—It was not likely that a great many days deliberation could paſs on that ſubject, before the cloſe of the ſeſſion: that, therefore, being the caſe, he readily concurred with the noble

noble and learned lord, who had expreſſed an opinion, that it was not proper for their lordſhips to proceed farther in it at preſent. In ſtating that propoſition, his lordſhip begged it not to be underſtood in any reſpect whatever, that he meant to give a negative to the bill, or that his ſentiments on the ſubject were not favourable to the paſſing of the bill, nor in any degree inauſpicious to what he conceived to be the principle of the bill. But their lordſhips, he ſaid, would obſerve, that the bill in profeſſion was a declaratory bill: it was not a bill to make that law which was not ſuppoſed to be law, but to declare and explain what was underſtood to be, at that inſtant, the law of the land. Whatever diſcuſſion it had undergone in another place, and, his lordſhip declared, that judging from the acknowledged talents of thoſe who ſpoke upon the ſubject, he had no doubt but it had been ably and amply diſcuſſed; but whatever ingenuity had been diſplayed, and however great had been the candour, the information, and correctneſs of thoſe who had conducted it in another place, his lordſhip really thought that the ſubject had not yet been diſcuſſed with that deliberation that its importance required; and when there was an opportunity of taking the bill into conſideration, that their lordſhips would receive better information, than, from the ſtate of the Houſe of Commons, it was poſſible for that Houſe to have received.

His

His lordſhip ſaid that it had been taken for granted, in converſations in the Houſe of Commons, that ſome courts had adopted a line of direction ſo clear, ſo eſtabliſhed, ſo legal, and concurred in by all the judges to ſuch a degree, that a deviation from it, even by thoſe who might be convinced in their conſciences that it was wrong, muſt be held to be a deviation from the law of England. Now, his lordſhip obſerved, ſuch an opinion could only be collected from a report of what paſſed in court, on a motion for a new trial, or from what paſſed at *niſi prius*. His lordſhip begged leave to declare, that neither of theſe, nor both of them, were a ſafe foundation for determining any point to be the law of England. Their lordſhips had the advantage of being attended by the learned judges. Had it been poſſible to have entered into the ſubject then, it was his lordſhip's intention to have moved for the attendance of the learned judges, who would have delivered their ſentiments with regard to what the law of England was with reſpect to thoſe directions.

In his lordſhip's apprehenſion, nothing that paſſed in court on a motion for a new trial, or at *niſi prius*, was a foundation of ſufficient weight and authority for a precedent; it was not ſufficient to ſay, that ſuch a charge, or ſuch a direction, was what the law required, and that there was no other agreeable to the law of the land. He was,

his

his lordſhip ſaid, by no means averſe to the principle of the bill; it was agreeable to what he conceived the law to be; it was agreeable to the direction which he had always given in caſes of libels, and to what he ſhould always give, till he was better informed. If the reſult of the opinion of the judges ſhould be, that the law of England was not according to the directions of the bill, then another conſideration would occur, namely, whether the law ought or ought not to be altered? The law, his lordſhip obſerved, ſhould be well underſtood by thoſe who took upon themſelves to declare it.—On theſe grounds, his lordſhip was of opinion, they were at a period of the ſeſſion when, conſiſtently with the reſpect that was due to themſelves, which was due to the ſubject, to the rights, and to the tranquillity of England, they could not proceed farther in the buſineſs; he therefore hoped their lordſhips would proceed in it early in the next ſeſſion of parliament.

LORD GRENVILLE

Roſe to concur in what had been ſtated by the noble and learned lord who had juſt ſat down. But at the ſame time that he did ſo, his lordſhip declared he ſhould be extremely ſorry if it ſhould go forth into the world that adminiſtration were againſt the bill, or unfriendly to the rights of juries: the intereſts of adminiſtration,

ſtration, and the intereſts of the people, were, his lordſhip obſerved, one and the ſame; the object of both was good government: he ſhould therefore be ſorry if it were conceived that the poſtponement expreſſed any thing like the ſenſe of that Houſe againſt the bill.

When their lordſhips conſidered the bill as a ſubject of very ſerious importance, and a matter which merited the moſt mature diſcuſſion, their lordſhips would clearly ſee they could not at preſent determine the buſineſs to their ſatisfaction. He ſpoke, his lordſhip ſaid, in the preſence of thoſe who poſſeſſed the greateſt experience and the greateſt abilities; it belonged to them more than it did to him, to give an opinion on this ſubject; he, however, ſhould vote for the poſtponement of the bill. In what had been given out to the world as the idea of the principle of the bill, and as the object to be obtained by it, his lordſhip declared, he felt himſelf very much inclined to concur; but with reſpect to the means of obtaining that object, with reſpect to the particular framing of the bill, or of any enacting bill on the ſubject, and much more with regard to declaring what the law was, his lordſhip ſaid, he could not help feeling, not only that he himſelf was not ſufficiently informed, but that the weight, importance, and dignity of the ſubject, was a reaſon why their lordſhips ſhould

not

not proceed without the aſſiſtance of thoſe from whom a declaration of the exiſting law muſt come with much more weight and authority than from any other quarter.

His lordſhip thought a caſe might poſſibly ariſe, in which even thoſe learned perſons perhaps might ſtate a declaration of law, in which their lordſhips might be unwilling to concur; they might ſtate a caſe, which their lordſhips might not be willing to conſider as being law. If their lordſhips opinion happened to be contrary to that of the learned judges, their lordſhips would doubtleſs employ a great deal of attention, deliberation, and examination on the ſubject, before they would declare, to the whole country, that not to be law, which the judges declared to be law.

They would conſider theſe two points: in the firſt place, in what manner the bill would affect other queſtions of law, in which the judges might be called upon for their aſſiſtance; in the ſecond place, they would be extremely cautious not to enact a future law in ſuch a manner, in ſuch terms, and ſuch forms, as might leave the queſtion more difficult to be decided, and more liable to debate and altercation than any exiſting law upon the ſubject.

It was for theſe reaſons, his lordſhip ſaid, that he muſt concur with thoſe who were of opinion that the conſideration of the buſineſs ought to be poſtponed;

poned; declaring at the ſame time, and wiſhing to be diſtinctly underſtood, that he did not poſtpone the bill becauſe he felt himſelf hoſtile to what he conceived to be the general principle of it; but he wiſhed to poſtpone it, becauſe he was inſufficiently informed; and leaſt of all did he poſtpone it with the idea that no meaſure ought to be taken on the ſubject. On the contrary he was (his lordſhip declared) ready then to ſtate, that he thought it of great importance, and of urgent and preſſing neceſſity, that their lordſhips and the parliament ſhould take ſome meaſure on the topic.

A great doubt unqueſtionably did prevail; that doubt ought to be ſettled, with a view to the intereſt which the public had in both parts of the queſtion; for it was idle to ſuppoſe, that, in a ſubject of that ſort, there was one intereſt in government, and another in the people. Advantage ſhould not be taken of that unqueſtionable principle, by diffuſing ill-founded calumny and ſeditious papers; and on the other hand, it was the intereſt of government to maintain a free conſtitution, as far as was conſiſtent with the execution of the laws; it was therefore the intereſt of government that there ſhould be a full and free diſcuſſion of all public meaſures, a proper and decent diſcuſſion of all matters of public concern. Thoſe, his lordſhip obſerved, who enter into ſuch diſcuſſions, ought to remember that they did it

under the ſecurity and protection, which they received from the laws of their country. There was nothing at preſent in the adminiſtration of juſtice, which could give the ſmalleſt ground of complaint on this ſubject.

He would, his lordſhip ſaid, venture to affirm, that the officers of the crown, whoſe duty it was to proſecute papers of a ſeditious ſort, and the reſpectable magiſtrates who diſpenſed the law, had for many years conducted themſelves with the utmoſt propriety, and that there never was a period in the hiſtory of this country, when the adminiſtration of juſtice in that reſpect had been, not only more unexceptionable, but had been more mild and leſs excepted againſt. In the future conſideration of this buſineſs, their lordſhips, Lord Grenville ſaid, would have that aſſiſtance, without which they could not be ſufficiently informed, and with which they would be enabled to ſettle the law for the advantage of the conſtitution of the country, and in a manner that would give ſatisfaction to the public mind.

LORD FITZWILLIAM

Agreed with thoſe noble lords who thought they were then arrived at a period in the preſent ſeſſion, when it was not probable they would be able to go through with the bill in a way worthy of its importance; but it would ill become him to hold

that

that idea, when in the courſe of a few minutes he was going to move that they might, among other things, have time to go through and finiſh that very buſineſs. For that purpoſe his lordſhip moved that the debate might be adjourned for half an hour:—which motion was put and negatived.

The MARQUIS of LANSDOWN

Then roſe, and obſerved, That the preſent was not the firſt bill on the ſubject that had ever been introduced into parliament: upwards of twenty years ago, a bill of the ſame nature was introduced, which was negatived merely on the ground that the law then ſtood exactly as the bill meant to eſtabliſh it, and that therefore the bill was unneceſſary. He recollected that it created as great a ferment among the people as any bill that in his memory had ever been brought before the public. The marquis ſaid, he well remembered the time when proſecutions of the preſs were frequent, when printers were brought repeatedly in every ſeſſion to the bar of both Houſes, but eſpecially of that Houſe, to be examined, re-examined, and committed, and when there paſſed ſcarcely a Term without ſome proſecutions for libels in the courts in Weſtminſter-hall. Thoſe proſecutions, the marquis obſerved, had in a great degree ſubſided till a very late period, when they had recommenced and ſhewn a tendency to get up again:

public animadverſion, however, had enjoyed and obtained its full ſcope.

The Houſe of Commons itſelf was not in a ſtate to be exempt from animadverſion, and the public prints, and the public, treated both Houſes of parliament with more freedom than they formerly durſt treat an individual. Such an uſe of the preſs he thought highly juſtifiable; but it muſt be acknowledged, the marquis ſaid, that the freedom of the preſs had been attended with numberleſs inconveniences. It was true, that a ſcandalous and ſhameful abuſe of the liberty we enjoyed had obtained; that it was abuſed even to licentiouſneſs. Even that very ſex which received protection in every country where a ſpark of virtue remained, was groſsly libelled in this. The beſt and moſt eminent, the noble, the beſt blood, and the moſt virtuous families in the kingdom, could not protect the characters of their wives and daughters from the moſt ſcandalous reflections. Even the foreign negociations of the country ſuffered by it. His lordſhip ſaid, he could cite chapter and verſe in ſupport of his aſſertion.

To his certain knowledge, foreign negociations had more than once ſuffered materially from the ſcandalous licentiouſneſs of the preſs, from publications meddling with ſubjects of which the authors had no ſort of knowledge, or, what was ten times worſe, who were ſet on by mercantile men, for

for mercantile purpoſes, or with worſe views, in order to influence ſuch negociations, and occaſion them to operate to their own private advantage. He himſelf, the noble marquis ſaid, had never condeſcended to commence a proſecution, or even to deſire a contradiction of thoſe ſcandalous reflections which had been poured upon him by the hirelings of both parties. The public judged of men from their actions; he was in no hurry to juſtify himſelf from the calumnies that had been poured forth againſt him perſonally for many years together; time would doubtleſs do juſtice to his motives. He had no particular object in view.

Although he had never applied to any of the public prints, to get any report contradicted which had appeared againſt him, he had, the marquis declared, once made an application to get a paragraph contradicted which might have been of material conſequence to the affairs of a minor peer, who was his ward. He did not wiſh to name the particular paper, becauſe he did not wiſh to encounter ſo *formidable* an enemy as a newſpaper; but he aſſured their lordſhips, that to ſuch a degree of inſolence and audacity was the preſs arrived, that he was obliged to exert all his addreſs and influence in order to get *a notorious lie* contradicted. Many things, his

lordſhip obſerved, were inſerted in the newſpapers for the purpoſe of mean intrigue, for the purpoſe of being read elſewhere, and reflecting upon the characters of their governors and rulers. Some remedy for that evil had long been wanted. He wiſhed that liberty might be enjoyed in this country in its fulleſt extent. He declared he never wiſhed to ſee the liberty of the preſs curtailed, but only its licentiouſneſs. He for one was a friend to the bill. It would, he thought, give them a diſtinct trial by jury. How could it poſſibly be conceived that the ſubject of libels could be fairly tried, when diſputes continually occurred between the bench and the jury? The judge often told the jury they had nothing at all to do with the law in the caſe of libels. In conſequence of ſuch altercations, perſonal feeling, and a conteſt for juriſdiction, were too frequently ſubſtituted in the place of important conſiderations, and the jury in nine caſes out of ten loſt ſight of the cauſe altogether, and vindicated their own rights. Whenever a political libel was tried, it equally became a diſpute between the judge and jury which of them had juriſdiction. That juriſdiction could never be ſufficient which had not fulneſs of power, and which had not removed from it all prejudice. He declared he had no difficulty about this ſubject; he had once read a great deal upon it.

They

They had been told by a noble lord that they ought to wait, that they might have an opportunity of comparing the analogy that there was between a libel and other caſes. What poſſible analogy could there be between a libel and other caſes, his lordſhip aſked, ſince it had been univerſally acknowledged that a libel was an *anomale?* There might be a diſtinction between murder and manſlaughter; in civil caſes, likewiſe, there might be a number of nice diſtinctions: but the caſe of libels lay out of the queſtion, and in every ſuch caſe law and fact were but one thing; and where, in God's name, could it be ſo ſafely entruſted as to twelve men? and how much better was it for the judge to be freed from ſuch a tickliſh duty, in all caſes of libel, whether it were a public or a private libel? How proper was it for the judge to addreſs the jury in this manner: "Gentlemen, you will recollect that men of the higheſt rank have been attacked; but in this country rank makes no difference, as long as the feelings of virtue are conſidered."

If it was a private libel, the judge would deſire the jury to bring the caſe home to themſelves, and would aſk them how they ſhould like to have their wives or their daughters abuſed in that manner. If the libel was of a political nature, and if a ſecretary of ſtate wanted to go on with ſuch a political negociation, was there a jury who would

heſitate a ſingle inſtant about it? Was there a jury who would heſitate if a lady of any foreign deſcription was to be ſerved, and a low abominable intrigue was to be carried on in a foreign country? Was there any idea of the ſmalleſt difficulty on this ſubject? Would the jury not perform their duty? Was it poſſible to entertain for a moment the ſmalleſt doubt on the ſubject? And how much nobler and better would it be for a judge to act in this manner, than to be ſubject to the baſe aſperſion that he was the inſtrument of a miniſter, or the inſtrument of arbitrary power, to advance a party, and to get more for himſelf! What a baſe, what a diſhonourable thing! Whether the aſperſions were true or falſe, his lordſhip knew it was not in human nature to avoid them. He declared that he alluded to no man nor body of men in theſe obſervations.

If the whole power were lodged in the jury, and if the proſecutor could expect no favour from the great man on the bench, a proſecution for a libel, inſtead of being accounted mean, would be conſidered as honourable, when the greateſt and firſt men in the country ſubmitted themſelves to the judgment of a jury. His lordſhip ſaid he wiſhed to do ample juſtice to judges both paſt and preſent, although he might have differed from ſome of them in certain political opinions, and he was the more diſpoſed to do that in their abſence,

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as it could only be imagined that he did it from a perfect conviction and real conſciouſneſs of their high merit, their diſtinguiſhed abilities, their profound knowledge, and from a conſciouſneſs that they were an honour to their friends and their country. If he had been totally unacquainted with theſe virtues, his lordſhip ſaid, there was a bill on the table ſufficient to convince all mankind of the nobleneſs of mind of the author of it (Lord Kenyon). The bill he alluded to, was a bill for aboliſhing the office of clerk of the aſſize. Their lordſhips might know, that the 5th and 6th of Edward VI. prohibited the ſale of any office, except by the two chief juſtices and judges of aſſize. It was well known, that when priſoners had nothing elſe to detain them, they were kept in jail for the fees which they were obliged to pay to clerks of the aſſize. This was fully explained in a book which was well worthy of their lordſhips peruſal, Mr. Howard's book on Jails.

Priſoners very often, who had been honourably acquitted, when there was not the ſmalleſt ſuſpicion of their guilt, inſtead of receiving an indemnification for the time they had been detained in jail, were obliged to pay large ſums to the clerks of aſſize. Nay, ſo much were priſoners perſecuted by ſuch fees, that they were very often tempted to be found guilty, though conſcious of their innocence, merely to avoid expences. By

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the bill on the table the noble and learned lord had immortalized himſelf. Although this appeared to be an act of ſo much virtue, he was, his lordſhip ſaid, not ſure that the Houſe of Commons had not ſo modified and altered it, as in a great meaſure to have defeated the benevolent purpoſe of its noble author. He hoped the ſame nobleneſs of mind would be carried a ſtep farther; and get that clauſe in the act of Edward the Sixth repealed, which excepted chief juſtices and judges of aſſize, and allowed them to do that which the act ſtated to be baſe and ſcandalous in any other man. The bringing in of the bill reſpecting the office of clerk of aſſize, was an act of a ſingle nature, and of a ſingle kind. He knew, the noble marquis ſaid, the virtue, the diſintereſtedneſs, the honeſty and integrity of the noble lord who had brought in that bill. Although he was not ſo much acquainted with the chief juſtice of the Common Pleas, yet, from what he had long obſerved of his public character and his public arguments, the very ſame obſervation was applicable to him.

A learned lord who was then no more, and whoſe memory he deplored (Lord Aſhburton), had ſignified his intention, if ever he filled the ſituation of the noble lord who had brought in the aſſize bill, to move for a repeal of that villainous act of parliament to which he had alluded. The bringing in of ſuch a bill, in his lordſhip's opinion,

was

was the nobleſt act of humanity that had been done theſe forty years. He wiſhed to ſee the rights of juries completely eſtabliſhed, and judges at the ſame time would afford them the benefit of their wiſdom and good ſenſe, and would put themſelves on a level, abandoning that abominable clauſe in that villainous act of parliament, rendered ſo by that particular clauſe. He ſhould not then be afraid to ſee them in that Houſe, and ſhould be the firſt to applaud them, and to look up to them with reverence; although his lordſhip did not think that the profeſſion in general were friendly to liberty, yet he was of opinion that profeſſion could do more for it than any other claſs of men, from their weight, influence and authority.

The Lord Chancellor

Then put the queſtion on his motion, which was carried; in conſequence of which the bill ſtood over till the next ſeſſion.

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## PROTEST

Againſt poſtponing the Bill.

*Die Mercurii, 8 Junii, 1791.*

THE order of the day being read for the ſecond reading of the bill, intituled, "An act to remove

remove doubts reſpecting the functions of juries in caſes of libels."

Moved, that the ſaid bill be now read a ſecond time.

Which being objected to,

An amendment was propoſed to be made to the ſaid motion, by leaving out the word (now) and inſerting inſtead thereof (this day month).

The queſtion was put, whether the word (now) ſhall ſtand part of the motion:

It was reſolved in the negative.

Then the queſtion was put, whether the words (this day month) ſhall be there inſerted.

It was reſolved in the affirmative.

DISSENTIENT,

1ſt. Becauſe we hold it to be an unalienable right of the people, that in caſes of libel (as well as in all criminal caſes) the jury ſhould decide upon the whole matter that may conſtitute the guilt or innocence of the perſon accuſed; and that in caſes of libel the jury ought not to be directed by the judge to find the defendant or defendants guilty, merely on the proof of the publication by ſuch defendant or defendants of the paper charged to be a libel, and of the ſenſe aſcribed to the ſaid paper in the indictment or information.

2dly. And becauſe we conceive that the ſaid right

of

of the people is of the utmoſt conſequence to the freedom of this nation, and to that bulwark of its rights, the liberty of the preſs.

3dly. And becauſe we conceive that the bill ſent from the Commons is well calculated to convey a parliamentary declaration and enactment of the ſaid important right of the people; and becauſe we conceive every delay of ſuch declaration and enactment to be in the higheſt degree dangerous to the ſafety of the ſubject.

4thly. And becauſe we conceive that we cannot with propriety refuſe our immediate aſſent to propoſitions which no perſon in the debate did deny to be ſalutary; and becauſe we conceive that this delay tends to give countenance to doubts that we apprehend to be utterly ill-founded, and to encourage a conteſt of juriſdiction that can only be injurious to the regular and impartial adminiſtration of juſtice in this kingdom.

STANHOPE.

For the firſt and ſecond reaſons.

RADNOR.

Another proteſt againſt the ſaid motion is entered and ſigned as follows:

DISSENTIENT,

1ſt. Becauſe we conceive, that the bill ſent from

the Commons is of the higheſt importance for the preſervation of the rights of juries; and that, conſidering the different opinions which have prevailed of late years with reſpect to this ſubject, we conceive every delay of a parliamentary declaration and enactment to be dangerous in the higheſt degree to the ſafety of the ſubject.

2dly. Becauſe, whatever difference of opinion may ſubſiſt in regard to the exiſting law, there ſeems to be ſo general a concurrence with reſpect to what ought to be the law in future, that we cannot, with propriety, refuſe our immediate aſſent to proviſions which are admitted to be ſalutary, on the ground of requiring time to aſcertain how far the late practice of the courts is, or is not, juſtifiable by the law of the land.

WENTWORTH FITZWILLIAM.
LAUDERDALE.
PORTCHESTER.
PORTLAND.
HAY, (Earl of Kinnoul.)

# HOUSE OF LORDS.

TUESDAY, *March* 20, 1792.

THE order of the day being read, that all the lords be ſummoned on public buſineſs:

EARL FITZWILLIAM,

Without any preface, moved that the bill be read a ſecond time.

THE LORD CHANCELLOR (THURLOW)

Thought that a matter of ſuch importance as a bill which tended to affect the long-eſtabliſhed practice of courts of juſtice, was of ſuch conſequence that it ought not to paſs without at leaſt aſking the opinion of the judges. They were at preſent on the circuits, and could not of courſe attend.

The bill, he underſtood, was brought into the Houſe by a gentleman, to whoſe abilities every man muſt pay the higheſt reſpect, and who, though

though not converſant in the practice of the law; yet was a moſt perfect maſter of its theory. The learned lord went into a long inveſtigation, not of the law of libels, but of the practice of judges in ſumming up their charges to juries, which he ſaid was invariable in the *Court of King's Bench*, from the reign of Elizabeth to the preſent day. Some judge or judges had indeed ſtarted their doubts on the right of a judge *directing a jury* what was law—and they might poſſibly be right, for he never ſat in a *court of law* as a judge, and therefore ſhould not take upon him to argue from his own knowledge; but if we were to pay reſpect to precedent—to that law and practice under which this country had arrived to its preſent pitch of greatneſs, we certainly ſhould not venture to alter it. So far as his own opinion went, guided by the authorities of Vaughan, Hale, Mansfield, and other eminent men, it appeared to him that the preſent bill was ſubverſive of what was truly the principle of the conſtitution, inaſmuch as it reſpected trial by jury.

It was a true fact, and wanted nothing declaratory to ſtrengthen it, that a jury were judges of the fact, and, if they choſe, might determine that fact contrary to law; logically, but not conſtitutionally or indeed wiſely ſpeaking: they were therefore judges of the law and the fact. He begged it might be underſtood, that if a man was *illegally* acquitted

acquitted on a libel, there was no reſource left to bring him to juſtice; but if he was illegally found guilty, he had his immediate reſource. The danger therefore, in his opinion, lay in altering, or rather improperly explaining the law on this ſubject.

By ſaying this much, he did not mean to encourage any debate on the ſubject. He only wiſhed, as this was a matter of law, that the judges ſhould be conſulted, and that their opinions ſhould be taken. He ſhould therefore move, by way of amendment to the noble earl's motion, "that this bill ſhould be read a ſecond time on Tueſday the 24th of April next."

EARL FITZWILLIAM

Had no objection to have the bill diſcuſſed by the judges; he ſhould be glad to hear what theſe venerable ſages of the law had to offer on the ſubject: and if the noble lord's amendment ſeemed to meet the concurrence of the Houſe, he for one ſhould acquieſce.

LORD PORTCHESTER

Saw no reaſon for the interference of the *judges*. The conſtitution had veſted in the three branches of the legiſlature, the power of making laws, (the judges made not an atom, as judges, in that legiſlature); and therefore, when a doubt aroſe con-

cerning any one act they had paſſed, moſt undoubtedly they who enacted that law, who debated on its principle, and who had well weighed and conſidered the cauſe and the effect it was intended to produce, were the moſt proper perſons to declare what that law meant. It was merely *riſing to explain.*

The learned lord had hinted ſomething like an opinion that judges were to direct juries what their verdict ſhould be; and he had ſaid, ſuch were the practices of the courts ſince the reign of Elizabeth. But, thank God! the enlightened day was arrived, when the conſtitution of this country was to be conſtrued in its true meaning. If the judge directed the jury—if he biaſſed them by his charge, the virtue of trial by jury was loſt—the twelve men in the box became cyphers—the mere tools of the bench;—they were unworthy the name of citizens, they were out of the catalogue of freemen:—but the grand point in which our liberties would be moſt affected was, by leaving the FREEDOM OF THE PRESS at the mercy of the judges.

Conſidering the whole of this buſineſs, he ſaw not the leaſt reaſon for waiting until the judges returned from the circuits. They made no part of the legiſlature; and conſequently it became a kind of diſgrace to the wiſdom of the legiſlature, that they could not paſs an act to explain what they

they had done, without aſking the judges whether they were right in ſo doing. This was ſetting the judges above the ſenate, and making parliament the mere echo of their ſervants.

LORD GRENVILLE

Said, he ever was, and ever would be of opinion, that juries were judges of the LAW as well as the FACT; and as this was a truth eſtabliſhed by the conſtitution, he ſaw no good reaſon for making it now the ſubject of debate. The LIBERTY OF THE PRESS was a bleſſing; but when improperly uſed, it was a curſe. The wiſdom of the legiſlature knew the truth of this obſervation, and very wiſely provided againſt the abuſe of that freedom. Juries had full power, if they thought it diſcretionary, to decide by their own opinion ſolely; and therefore, to bring in a declaratory act at preſent, ſeemed to him as a bait thrown out to the people to catch ſomething more than applauſe. Libels had lately taken a high leap indeed; inſtead of gratifying private malice againſt individuals, or ſimply arraigning the conduct of miniſters, they openly and avowedly attacked the conſtitution—ſolicited the people to fly in the face of their own happineſs—and in a manner intreated them to ſubvert the government of the nation. Was this a time to bring forward bills of the nature and tendency of the preſent one? Certainly not.

For ſuppoſing the bill to paſs, it would not add an atom of ſtrength to the conſtitution. It only ſtated a truiſm.

The noble lord, therefore, thought that the opinion of the judges was but a decent compliment to their high ſtations, not that he held himſelf bound as a member of parliament by their ſentiments on the occaſion.

EARL STANHOPE

Was decidedly againſt the opinion of the judges being taken. He ſaid, they had nothing to do with the deliberations of the Houſe; and that in a matter where their power ſeemed to be at iſſue with the rights of the people, they ought to remain ſilent ſpectators. He by no means coincided with the noble lord on the woolſack. Juries were judges of both the LAW and the FACT; and the man who, after he was ſworn to give his verdict, ſurrendered his judgment to the bench, was a perjured man. In reſpect to libels, the point of all others on which a jury ſhould pique themſelves, was never to permit the *innuendo* to be decided upon by the judge. The *innuendo* was the *libel* which they had pledged themſelves to their God and their country to try.

As to the fact of publication, it was a mere farce—it was never denied;—ſo that the jury were like ſo many cyphers if they did not try by evi-

dence the merits of the record. What were they convened for? Did the conſtitution mean they ſhould only find the fact of ſelling a paper? Good God! ſurely not. The conſtitution was made by the voice of the people, and the people could never be ſo ridiculous as to mean that the people were not to be the ſole judges of what they had done. The preſs was the firſt check in the world upon the arbitrary proceedings of judges. They were afraid of it, and there was ſcarcely *one* in *twelve* who could ſay a civil word in its behalf. "Would you then," ſays the noble lord, "make theſe men, who are evidently a party concerned, arbitrators in their own cauſe? If you do, the event is clear—they will throw out the preſent bill."

EARL OF LAUDERDALE

Was decidedly of opinion, that the point ſhould never go to the judges. The Houſe was competent to decide upon its own acts; and if ever they thought otherwiſe—if ever they ſurrendered up that privilege, then the judges, and not the repreſentatives of the people, were the parliament of Great Britain. It had been ſaid, that the judges would be glad to get rid of this diſagreeable buſineſs of deciding upon the law in caſes of libels; but he much feared, that where a power and conſequence exiſted, it muſt require more than common philoſophy even on the bench to give it up.

LORD GRENVILLE and EARL FITZWILLIAM

Said a few words in explanation; after which, the queſtion being put on the amendment, it was carried without a diviſion.

Adjourned.

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## HOUSE OF LORDS.

FRIDAY, *April* 27, 1792.

THE order of the day for the ſecond reading of this bill being read:

LORD KENYON

Said, that he was a friend to any endeavours for effecting neceſſary reforms, as far as they were conſtitutionally made, and did not endanger the ſpirit of the exiſting laws. His lordſhip, after ſome obſervations upon the ſerioufneſs and importance of the preſent bill, read a liſt of queſtions, which he ſhould move to have propoſed to the judges, that their opinions might be known, before the Houſe proceeded to any further diſcuſſion upon the ſubject.

EARL STANHOPE,

In a few words, defended the principle of the bill,

bill, and the manner in which the reform to be effected by it was offered.

LORD LOUGHBOROUGH

Admitted the propriety of the queſtions to be propoſed to the judges, and did not then intend to enter at great length into the principle of the bill.

With reſpect to what might be held libellous doctrines, he would, however, venture to make this diſtinction. Enquiries into the general principles of government, and the nature of general liberty, he thought perfectly legal. If abſurd doctrines were offered by enquirers upon ſuch ſubjects, they carried their own puniſhment with them, and might be ranked amongſt the many *Utopian* ſyſtems, which have had their day, and are forgotten. But any application of ſuch doctrines to preſent occaſions and imaginary grievances; any endeavour to excite immediate tumult by publiſhing them, he held criminal and libellous. The quotation of texts from holy writ, was as unlikely to endanger the peace of a country, as any thing which could be mentioned, and a collection of them, whatever might be the tendency, could ſcarcely be held criminal; yet, if certain words, ſuch as, "To your tents, O Iſrael!" and others extracted from the Scriptures, were diſtributed amongſt a number of perſons collected for ſome

purpoſe of reſiſtance, that publication of them would be an offence. The general doctrine of reſiſtance might be affirmed, without impropriety; but if the people were invited to reſiſt, upon ſtatements of a particular and imaginary grievance, that invitation was certainly a breach of the peace.

As to the right of juries to decide upon the law, as well as the fact, in caſes of libel, it had always been admitted, that juries might, if ſo they choſe, bring in general verdicts both upon the law and the fact, wherever there was a general iſſue. The only poſſible mode to withdraw a queſtion of law from their cognizance, if they choſe to decide upon it, was by a demurrer to the evidence; in which inſtance, the demurring party ſubmitted to the evil of admitting all the facts ſtated by the evidence, and all the inferences to be drawn from it, contending only for the illegality of admitting ſuch teſtimony. Such was the power of juries univerſally admitted, if they choſe to exerciſe it; but ſubject, indeed, to ſome ſubſequent ſuperintendance of the court, who, in civil caſes, granted new trials.

Formerly, when the law was ſo clear that no man could be ſuppoſed to miſinterpret it without intention, juries were puniſhed for unjuſt verdicts by the writ of *attaint*. This writ, however, lay only in civil caſes; for ſo tender was the conſtitution of the jury's right to determine upon all the

the law and all the fact in criminal caſes, that there was no inſtance of any puniſhment inflicted for errors in their deciſions upon them. This writ, however, ſince the complication of the law, by men's deſire to produce various limitations of their property, and by other circumſtances, had ceaſed; and, about the beginning of the laſt century, the cuſtom of giving ſpecial verdicts aroſe.

Even in civil caſes then, there exiſted no reſtriction againſt the right of the jury to decide both upon the law and the fact, though there had once been a puniſhment upon them for errors; and there was now a mode of ſubmitting the law to the court, from which the iſſue was directed, if the jury choſe ſo to ſubmit it. But in criminal caſes, the conſtitution had taken an eſſential diſtinction. The criminal law was ſuppoſed to be within the comprehenſion of every man; ſo much ſo, that no man could be juſtified for offences againſt it by his ignorance. In civil caſes, on the contrary, an ignorance of the law was often preſumed for the benefit of the party. In the caſe of a will, for inſtance, it was preſumed, that the party did not underſtand the legal form of making it, and it was therefore interpreted favourably for him. From this preſumption, that in civil caſes the law might not be known to the jury, while in criminal circumſtances no man was held to be ignorant of it, his lordſhip argued for the ſuperior

right

right of juries in the latter inſtance, to decide both upon the law and the fact; though, in the former, they had the right, if they choſe to exerciſe it, ſubject not to interruption from the court, but to ſubſequent ſuperintendance. Here his lordſhip read an extract, in ſupport of his opinion, from the works of Judge VAUGHAN, of whoſe character he ſpoke with much praiſe.

His lordſhip, after apologiſing for being thus drawn into the general queſtion, ſaid, that he ſhould reſerve his further ſentiments upon it till a future occaſion. At preſent he would only ſay, that the danger of injuſtice from juries, aroſe only from a diſpoſition to limit their rights. In the whole of his legal walk he had found, that when a plain charge was given to a jury, they never miſtook either the law or the fact. It was only by endeavours to puzzle their underſtandings, that they were provoked to loſe ſight of juſtice. They then thought themſelves engaged in a contention with the judge, and forgot the ſubject before them.

The LORD CHANCELLOR

Was ſorry to perceive, that any inveſtigation of the general ſubject had taken place, when only a *bye queſtion* was before the Houſe. He ſhould go into it no further than was neceſſary, in reply to ſome obſervations of the noble lord who ſpoke laſt.

It

It had been ſaid, that general diſcuſſions of the nature of government, and of the principles of liberty, were not illegal, however they might be erroneous. He did not know that ſuch a doctrine could be ſupported; but he knew, that this was not the moment when ſuch diſcuſſions were to be encouraged: and he lamented that it ſhould go out to the world, under the authority of having been uttered in that Houſe, that any man might dare to ſpeak diſreſpectfully either of the perſons of magiſtrates, or of the conſtitution of magiſtracy; that he might dare to traduce the one, or give the public an ill opinion of the other. As to what had been ſaid of publications addreſſed to perſons who were in a ſtate of reſiſtance, he thought ſuch a publication amounted to a higher crime than that of libel.

The ſimplicity of the law in criminal caſes was not ſuch as had been repreſented. A work which was probably in the hands of many of their lordſhips, publiſhed by a gentleman of the name of Leach, contained a liſt of all the queſtions which had been referred to the judges, on the firſt days of Terms in Serjeants-Inn Hall; and it would appear from that work, that the criminal law was not free from intricacies, which required the deciſion of the judges. That an ignorance of the civil law was preſumed from its ſuperior difficulty, he denied. In a caſe of treſpaſs,

treſpaſs, would a man be excuſed for the injuries committed by his cattle, on account of his ignorance concerning the true nature of his tenure? Did not men daily ſuffer for their ignorance of the nature of contracts? Did it not often happen, that four or five arguments in the courts below, one in Serjeant's-Inn Hall, and another in that Houſe, were neceſſary to inform them concerning it?

His lordſhip read an extract from the works of Judge VAUGHAN, to the elegant character given of whom he perfectly ſubſcribed; it exactly followed that read by a learned lord, but *being on the other ſide of the leaf*, it had probably eſcaped notice. He alſo quoted an opinion of Judge FOSTER, who had formed himſelf upon the model of Judge HALE. Judge FOSTER, his lordſhip obſerved, had become highly *popular* by deſpiſing *popularity*, and was properly, as his lordſhip thought, of opinion, that nothing was *ſo contemptible as a popular judge*. He hoped, that arguments upon the general principle of the bill would be reſerved for a more ſuitable occaſion, and was ſorry that he had been induced to occupy the attention of the Houſe by noticing them.

LORD PORTCHESTER,

After a few words, moved ſome additional queſtions to be propoſed to the judges.

LORD

LORD KENYON

Said, that among ſome ſtatements which he could not admit, was that of any difference between judges, as to the duty of permitting the jury to determine both upon the guilt and upon the fact of publication. There had never been any doubt that ſuch a queſtion was very proper for the deciſion of the jury. An hawker might circulate, with the king's proclamation againſt vice and immorality, a ſeditious paper, and might be ignorant of the contents of both. The queſtion relative to his motives, would certainly be determined upon by the jury.

His lordſhip obſerved, that he had no particular reaſon to be anxious as to the preſent bill, for he had never had the ſlighteſt conteſt with a jury. The only difference of that ſort, to which he had ever been witneſs, was in the caſe of the Dean of St. Aſaph.

LORD LOUGHBOROUGH

Hoped that nothing like altercation would appear upon the preſent queſtion. That he might not appear to have lightly adopted opinions which he ſhould probably carry with him to his grave, he would, upon a future occaſion, produce his authorities for them. They differed certainly from a ſeries of opinions entertained by great numbers of reſpectable perſons; but he could ſhew, that in number

number at leaſt, they had as many ſupporters, and it would be for the Houſe to decide whether they had not alſo as much weight.

His lordſhip moved the two following queſtions to be referred to the judges:

1. Whether upon an information, or indictment for libel, the *innuendo* alledged be matter of fact, or matter of law?

2. Whether, upon an indictment for treaſon, where the overt act is the publication of a writing or paper, the *innuendo* be matter of fact, or matter of law?

For the deciſion of theſe and other queſtions he waited anxiouſly, for nothing was ſo far from his purpoſe, as the defence of any thing like libels, which he believed would be more effectually repreſſed by the preſent bill, than by any other means.

LORD MULGRAVE

In a few words, defended the bill.

The EARL of LAUDERDALE

Roſe only to reply to one obſervation of a learned lord's (Lord Kenyon) affirming, that no judge had ever reſtrained a jury from conſidering the guilt, as well as the fact of publication. It was no longer ago than in the caſe of the Dean of St. Aſaph, that the judge not only neglected to direct the attention of the jury to the conſideration

of

of the guilt or innocence, as well as of the fact of publication, but directly told them that they had nothing to do with it. His lordſhip read an extract to this purpoſe from the trial of the Dean of St. Aſaph.

LORD STORMONT

Supported the queſtions propoſed.

LORD GRENVILLE,

After ſome compliments to Lord Mulgrave, pronounced a panegyric upon the Britiſh conſtitution, which he was confident was admired, and would continue to be ſo. At a more ſuitable opportunity he ſhould deliver his ſentiments upon the preſent bill, which related to a part of that conſtitution certainly moſt ſerious and valuable. At preſent, it was ſufficient to ſay, that he thought the meaſure of propoſing queſtions to the judges extremely proper.

The queſtions propoſed were then adopted by the Houſe.

Adjourned.

HOUSE

# HOUSE OF LORDS.

FRIDAY, *May* 11, 1792.

THE opinions of the judges on the queſtions referred to them by the Houſe were this day delivered.

EARL OF ABINGDON

Was againſt the bill *in toto*, as one of the many violent attempts at innovation of the preſent day.

On motion of LORD CAMDEN, the opinions of the judges were ordered to be printed, and the lords were ſummoned for the conſideration of the ſame on Wedneſday the 16th.

Adjourned.

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OPINIONS *of the* JUDGES *upon the ſeveral queſtions put to them upon the ſecond reading of the bill to remove doubts reſpecting the Functions of Juries in caſes of Libel, April* 27, 1792, *as delivered by Sir James Eyre, Knt. Lord Chief Baron of the Court of Exchequer, on the* 11*th of May* 1792, *in the Houſe of Lords.*

MY LORDS,

THE judges have taken the queſtions, ſeven in number, which your lordſhips have been pleaſed

to

to propoſe to them, into their conſideration; they have conferred together, and have agreed upon anſwers, which I am now to ſubmit to your lordſhips.

Your lordſhips' firſt queſtion is: "On the trial of an information or indictment for a libel, is the criminality or innocence of the paper ſet forth in ſuch information and indictment, as the libel, matter of fact, or matter of law, where no evidence is given for the defendant?"

Preliminary to all which we have to offer to your lordſhips, we ſtate, as a fundamental principle, that the general criminal law of England is the law of libel; and that the very few particularities which occur in legal proceedings upon libel, are not peculiar to the proceedings upon libel, but do or may occur in all caſes where the *corpus delicti* is ſpecially ſtated upon the record: the caſe of an indictment for publiſhing a forged promiſſory note, may be put as a pregnant inſtance.

The matter of your lordſhips' firſt queſtion has no particular application to libel.

We anſwer, That the criminality or innocence of *any act done* (which includes any paper written) is the reſult of the judgment which the law pronounces upon that act, and therefore muſt be in all caſes, and under all circumſtances, matter of law, and not matter of fact; and this, as well where

evidence is given, as where it is not given for the defendant; the effect of evidence given for the defendant as to this queſtion, being nothing more than to introduce facts or circumſtances into the caſe, which the proſecutor had left out, upon which t will ſtill be for the law to pronounce whether the act done be criminal or innocent.

Your lordſhips' ſecond queſtion is: "Is the truth or falſehood of the written or printed paper material, or to be left to the jury on the trial of an indictment or information for a libel; and does it make any difference in this reſpect, whether the epithet *(falſe)* be or be not uſed in the indictment or information?"

The queſtion conſiſts of two branches.

Our anſwer to the firſt branch of this queſtion is, That the truth or falſehood of a written or printed paper is not material, or to be left to a jury upon the trial of an indictment or information for a libel.

We conſider this doctrine as ſo firmly ſettled, and ſo eſſentially neceſſary to the maintenance of the king's peace, and the good order of ſociety, that it cannot now be drawn into debate.

If it be aſked, why the word "*falſe*" is to be found in indictments or informations for libel? we anſwer, that we find it in the ancient forms of our legal proceedings, and therefore that it is re-

tained; but that it hath in all times been the duty of judges, when they come to the proof, to ſeparate the ſubſtance of the crime from the formality with which it is attended, and too frequently loaded, and to confine the proof to the ſubſtance.

The epithet "*falſe*" is not applied to the propoſitions contained in the paper, but to the aggregate criminal reſult—libel. We ſay, *falſus libellus*, as we ſay *falſus proditor* in high treaſon.

In point of ſubſtance, the alteration in the deſcription of the offence would hardly be felt, if the epithet were *verus* inſtead of *falſus*.

In the action for libel, the plaintiff is not put to prove the matter of the libel to be falſe, which is deciſive to ſhew that the falſehood is not part of the ſubſtance of the complaint; and though the defendant may inſiſt in his defence, and may prove, that the matter of the libel is true, it is not done in the way of contradicting what is aſſerted by the plaintiff, for then it might be done under the general iſſue: whereas, if the defendant means to inſiſt that the matter of the libel is true, he muſt plead it by way of juſtification, as between him and the plaintiff, ſeeking to recover damages for the private injury, the truth of the matter of the libel is a bar to the action for damages; the crime, and conſequently the *falſus libellus*, remaining ſtill in full force againſt him.

The ſecond branch of the queſtion is: Does

it make any difference in this reſpect, *i. e.* in reſpect of the materiality of the truth or falſehood, or its being to be left to the jury, whether the epithet "*faſe*" be or be not uſed in the indictment or information?

Our anſwer will be very ſhort. It can make no difference in this reſpect. We are not called upon to give any opinion, and we deſire to be underſtood not to give any opinion as to the difference in any other reſpect which the omiſſion of a formal epithet in an indictment or information may make.

Your lordſhips' third queſtion is: "Upon the trial of an indictment for a libel, the publication being clearly proved, and the innocence of the paper being as clearly manifeſt, is it competent and legal for the judge to direct or recommend to the jury to give a verdict for the defendant?"

We anſwer, that upon the trial of an indictment for a libel, the publication being clearly proved, and the innocence of the paper being as clearly manifeſt, it is competent and legal for the judge to direct or recommend to the jury to give a verdict for the defendant.

But we add, that no caſe has occurred in which it would have been, in ſound diſcretion, fit for a judge, ſitting at *niſi prius*, to have given ſuch a direction or recommendation to the jury.

It

It is a term in the queſtion, that the innocence ſhall be clearly manifeſt. This muſt be in the opinion of the judge: but the ableſt judges have been ſometimes decidedly of an opinion which has, upon further inveſtigation, been diſcovered to be erroneous; and it is to be conſidered, that the effect of ſuch a direction or recommendation would be *unneceſſarily* to exclude all further diſcuſſion of the matter of law in the court from which the record of *niſi prius* was ſent, in courts of error, and before your lordſhips in the *dernier* reſort.

Very clear, indeed, therefore, ought to be the caſe in which ſuch a direction or recommendation ſhall be given. In a criminal caſe, which is in any degree doubtful, it muſt be a very great relief to a judge and jury, and a great eaſe to them in the adminiſtration of criminal juſtice, to have the means of obtaining a better and fuller inveſtigation of the doubt, upon the ſolution of which a right verdict, or a right judgment, is to depend.

A ſpecial verdict would in many caſes be the only means, where the offence is deſcribed by ſome one or two technical terms comprehending the whole offence, the law and the fact combined: ſuch as the words, "feloniouſly did ſteal." The combination muſt be decompoſed by a ſpecial verdict, ſeparating the facts from the legal qualities aſcribed to them, and preſenting them in detail to the eye of the judge, to enable him to

declare, whether the legal quality aſcribed to them be well aſcribed to them or not.

There may be a ſpecial verdict in caſes where doubts ariſe on the matter of law, but it is not *neceſſary* in all caſes. In ſome criminal proceedings (the proceedings in libel, and the publication of forged papers, for inſtance), ſome of the facts are detailed in the indictment; and if the doubt in law ſhould happen to ariſe out of the fact ſo detailed, we ſay it is upon the record. The queſtion might have been diſcuſſed upon demurrer, without going to a jury at all; and after verdict it may be diſcuſſed on a motion in arreſt of judgment. In ſuch caſes a ſpecial verdict is not neceſſary: the verdict "Guilty" will have the effect of a ſpecial verdict, without the expence and delay of it, eſtabliſhing all the facts, and leaving the queſtion of law open to diſcuſſion.

There are three ſituations in which a defendant, charged with a libel, may ſtand before a judge and jury in a court of *niſi prius*. Firſt, the matter of law may be doubtful; in that caſe there ought to be a ſpecial verdict, or a verdict which ſhall operate as a ſpecial verdict. Secondly, the caſe may, in the opinion of the judge, be clear againſt the defendant. If the verdict is ſpecial, in form or in effect, he has no reaſon to complain; his caſe comes before the court from which the record is ſent, without the prejudice of an authority againſt him.

him. The third ſituation is, That the opinion of the judge may be clear in favour of the defendant. In that caſe, whenever it ſhall happen, we have offered it as our opinion, that it will be competent and legal for the judge to direct an acquittal.

Your lordſhips' fourth queſtion is: "Is a witneſs produced before a jury in a trial as above by the plaintiff, for the purpoſe of proving a criminal intention of the writer, or by the defendant, to rebut the imputation, admiſſible to be heard as a competent witneſs in ſuch trial before the jury?"

The queſtion is put ſo generally, that we find it impoſſible to give a direct anſwer to it.

The criminal intention charged upon the defendant in legal proceedings on libel, is generally matter of form, requiring no proof on the part of the proſecutor, and admitting of no proof on the part of the defendant to rebut it.

The crime conſiſts in publiſhing a libel; a criminal intention in the writer is no part of the definition of the crime of libel at the common law. "He who *ſcattereth firebrands, arrows*, and *death*" (which, if not an accurate definition, is a very intelligent deſcription of a libel) is *ea ratione* criminal; it is not incumbent on the proſecutor to prove his intent, and on his part he ſhall not be heard to ſay, "*Am I not in ſport?*" But inaſmuch as a criminal intention *may* conduce to the

proof of the publication of all libels; and inaſmuch as that criminal intention is of the ſubſtance of the crime of libel in ſome caſes by ſtatute; caſes may be put, where a witneſs is competent and admiſſible to prove the criminal intention on the part of the proſecutor; and it may be ſtated as a general rule, that in all caſes where a witneſs is competent and admiſſible to prove the criminal intention, a witneſs will alſo be competent and admiſſible to rebut the imputation.

Your lordſhips' fifth queſtion is: "Whether, upon the trial of an indictment, for ſending a threatening letter, the meaning of the letter ſet forth in the indictment be matter of law or of fact?"

We find ourſelves embarraſſed by the terms in which this queſtion is propoſed to us.

We find no difficulty in anſwering, that the expoſition of the words of the letter, ſet forth in an indictment for ſending a threatening letter, would belong to the court, either on a demurrer, or in an arreſt of judgment; and we have no difficulty in going a ſtep further, and ſaying, that if the jury, upon the trial of ſuch an indictment, were to find a letter according to its tenor, it would be for the court to expound the letter.

And whether the letter (the ſenſe of it being thus aſcertained) be a threatening letter within the meaning of the law, is anſwered by our law to the

firſt queſtion. This we ſtate diſtinctly to be matter of law; it is the judgment of the law, pronouncing whether the paper be criminal or innocent.

But your lordſhips aſk us, "Whether the ſenſe of the letter be matter of law or of fact?"

We find a difficulty in ſeparating the ſenſe of the letter from the letter; the paper without the ſenſe is not a letter.

Whether there exiſts ſuch a letter, is doubtleſs matter of fact; as much as, whether it was ſent to the proſecutor of the indictment.

It is alſo matter of fact, whether an act of parliament, public or private, exiſts. And the ſame may be ſaid of every other writing, from records of the higheſt nature down to any ſcrap of paper wherein words are written which can be qualified with crime or civil obligation.

This goes no way towards aſcertaining what belongs to a jury in an indictment for ſending a threatening letter, to which we apprehend your lordſhips' queſtion was intended to point.

The exiſtence of a public act of parliament, your lordſhips know, is not ſubmitted to a jury at all; private acts and records may be *ſub modo* other inſtruments and papers are; but all, without exception, are expounded by the judges, and the legal effect of them declared by the judges.

This does not reſt merely on the authority of lawyers;

lawyers; in the nature of things it muſt be, that the judges muſt expound or recollect the ſenſe of the paper, in order to their declaring the operation of it in law.

The ſenſe of a threatening letter, or of any other words reduced into writing, is nothing more than the meaning which the words do, according to the common acceptation of words, import, and which every reader will put upon them. Judges are in this reſpect but readers. They muſt read and underſtand before they can pronounce upon criminality or innocence, which it belongs to them to do. It is a neceſſary and inſeparable incident to their juriſdiction. If they could reſort to a jury to interpret for them in the firſt inſtance, who ſhall interpret the interpretation, which, like the threatening letter, will be but words upon a paper?

We ſhall not be underſtood to be ſpeaking of that ſenſe of a paper which is to be collected from matter *dehors* the paper, which in legal proceedings muſt be ſtated by way of averment; which would be to be eſtabliſhed in point of fact, before the judges could proceed to conſtrue a paper. On a demurrer, or on motion in arreſt of judgment, theſe averments would ſtand confeſſed upon the record. If the general iſſue is pleaded, they are to be found by the jury. Judges have no means of knowing matters of fact *dehors* the paper, but by the confeſſion of the party, or the finding

of

of the jury: but they can collect the intrinſic ſenſe and meaning of a paper in the ſame manner as other readers do; and they can reſort to grammars and gloſſaries, if they want ſuch aſſiſtance.

Theſe principles lead to the ſame concluſion for juries as for judges, in all points belonging to threatening letters, or to any other ſeries of words reduced into writing, which fall within the province of juries. For inſtance, upon a general iſſue on an indictment for ſending a threatening letter, a jury is to enquire, whether ſuch a paper as the paper charged in the indictment exiſts. They muſt read, or hear read, and underſtand the paper charged, and the paper produced to them in evidence, in order to their finding that the paper charged does exiſt. The jury cannot know that they are the ſame papers, without comparing both the words and the ſenſe; but when the jury have read and ſufficiently underſtood, the paper charged and the paper produced, ſo as to be enabled to pronounce that they are the ſame papers; when the averments have been examined, and found to be true; when the context (if there be a context not ſet forth) has been ſeen and underſtood, and found not to alter the ſenſe of the paper produced, and to put a different ſenſe upon it than that which the paper charged imports; and when the ſending of the ſuppoſed threatening letter is found

as

as charged; then all enquiry before the jury ends; the reſt is matter of legal concluſion.

Your lordſhips' ſixth queſtion is: "Whether, on the trial of an indictment for high treaſon, the criminality or innocence of letters or papers as ſet forth as overt acts of treaſon, or produced as evidence of an overt act of treaſon, be matter of law or of fact?"

We have ſaid, in our anſwer to the firſt queſtion, that in all caſes, and under all circumſtances, the criminality or innocence of an act done, is matter of law, and not of fact.

We find nothing in the two caſes now put, which ſhould lead us to narrow the generality of that propoſition, or to except either of thoſe caſes out of it.

But, that we may not be miſunderſtood, we add, that this opinion does not gō to the length of taking from the jury the application of the evidence to the overt act of which it is evidence. It only tends to fix the legal character of it in the only way in which it can be fixed. And we take this occaſion alſo to obſerve, that we have offered no opinion to your lordſhips which will have the effect of taking matter of law out of a general iſſue, or out of a general verdict.

We know that it is often ſo combined with both as to be inſeparable from them; and we diſclaim the

the folly of endeavouring to prove, that a jury, who can find a general verdict, cannot take upon themſelves to deal with matter of law ariſing in a general iſſue, and to hazard a verdict made up of the fact, and of the matter of law, according to their conception of the law, againſt all direction by the judge.

Our aim has been to trace the boundary line between matter of law and fact, as diſtinctly as we could. We believe that this is all that is neceſſary to be known. We have found jurors in general deſirous of keeping within their province, which is to examine into matter of fact, and cordially diſpoſed to take their directions in matter of law from thoſe whoſe education and habits enable them to declare the law, and to whom the law and conſtitution of the country have committed that important truſt.

Your lordſhips' laſt queſtion is: "Whether, if a judge on a trial on an indictment or information for a libel, ſhall give his opinion on the law to the jury, and leave that opinion, together with the evidence of the publication, and the application of the innuendos to perſons and things, to the jury, ſuch directions would be according to law?"

If we do not miſunderſtand this queſtion, it is ſubſtantially anſwered in our anſwer to the third queſtion.

We

We mean to anſwer this queſtion in the affirmative; but, that we may be clearly underſtood, we deſire to be permitted in our anſwer to ſubſtitute the words "declare the law," inſtead of "give his opinion of the law;" and the word "declaration" inſtead of "opinion," when the word "opinion" occurs again in the queſtion; our anſwer will then ſtand thus:

"If a judge on a trial on an indictment or information for a libel ſhall declare the law to the jury, and leave that declaration, together with the evidence of the publication, and the application of innuendos to perſons and things, to the jury, ſuch direction would be according to law."

If, by the words "leave that opinion to the jury," is meant in any manner to refer to the jury the conſideration of what the law is, in any view of the particular caſe in evidence, we are of opinion, that ſuch a direction would not be according to law; conceiving the law to be, that the judge is to declare to the jury what the law is; and conceiving that it is the duty of the jury, if they will find a general verdict upon the whole matter in iſſue, *to compound that verdict of the fact as it appears in evidence before them, and of the law as it is declared to them by the judge.*

We prefaced our anſwers with ſtating, that the general criminal law of England was the law of libel. We conclude what we have to offer to

your

your lordſhips with ſtating, that the line marked out by the law for the conduct of a jury giving a general verdict, has an univerſal application to general verdicts on general iſſues, in a'l caſes civil and criminal; for we cannot diſtinguiſh between the office and authority of a jury in civil and criminal caſes, whatever difference there may be as to their reſponſibility. We deſire to put your lordſhips in mind, that it hath been the modern policy to bring almoſt all queſtions, upon men's deareſt and moſt valuable rights, to be decided on a general iſſue; and it will be for your lordſhips' conſideration, whether the line we have pointed out, which we take to be eſtabliſhed in law and in reaſon, is not a great and eſſential ſecurity to the life, liberty, and property of all the king's ſubjects, from the higheſt to the loweſt.

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## HOUSE OF LORDS.

FRIDAY, *May* 18, 1792.

On reading of the order of the day on this bill,

LORD CAMDEN

Roſe to ſupport an opinion which he was known to

to poſſeſs, and which he never, ſince he had formed it, had occaſion to alter. Queſtions, he ſaid, had been put to the judges; but they had contented themſelves with anſwering them dryly, and avoiding the grand queſtion, "Who ſhould try a libel." On this point he was as firmly convinced as he ever was of any thing. *It was to the jury, and to the jury only, that a queſtion of libel ſhould be ſubmitted*; and as this had been doubted, it was proper the point ſhould be ſet at reſt. He wiſhed the Houſe to reflect on the conſequence of leaving it a point unſettled. Hereafter, in caſes of libel, the counſel for the defendant would urge to juries, that this bill was the general ſenſe of the people of England, expreſſed in the Houſe of Commons, almoſt *nemine contradicente*—and who was the judge who would dare to ſtop a barriſter making ſuch an obſervation? On the other hand, the counſel for the proſecution might inſiſt on the opinion of the Houſe of Peers againſt the principle of the bill. This would introduce endleſs altercations between the jury and the bench, and would be a great impediment to the diſtribution of public juſtice, and might affect the tranquillity of the people.

He expoſed the fallacy of the pretended diſtinction between law and fact, in the queſtion of *Guilty*, or *Not guilty*, of printing or publiſhing a libel: they were united as much as intent and action, in the conſideration of all other criminal proceedings.

proceedings. Without an implied malice, a man could not be found guilty even of murder. The ſimply killing of a man was nothing, until it was proved that the act aroſe from malice. A man might kill another in his own defence,—or, under various circumſtances, which rendered the killing no murder. How were theſe things to be explained? By the circumſtances of the caſe.—What was the ruling principle? The intention of the party.—Who were judges of the intention of the party? the judge? No; the jury. So that the jury were allowed to judge of intention upon an indictment for *murder*, and not to judge of the intention of the party upon *libel*. This was ſo much out of all principle of juſtice and common ſenſe, that it could not be ſupported for a moment. Our anceſtors, indeed, had remained ſilent upon the point, whether the intent of the party, and tendency of a publication alledged to be a libel, was matter of law, or matter of fact? The reaſon was obvious; it was neither the one nor the other ſimply, but a compound of both, and which in their very nature could only be decided by a jury.

There could be no libel without a miſchievous intention and tendency; the jury, if deprived of judging of that intention and tendency, might as well be deprived of the power of judging of the fact of the publication; for the intention and tendency made part of the ſubject in conteſt between the parties. On the part of the proſecution it was

alledged, that the defendant did wilfully, maliciouſly publiſh, &c. The defendant denied this charge by his plea, " I am not guilty of the offence laid to " my charge."—What were the jury ſworn to do? " Well and truly to try the iſſue joined."—The queſtion was, who ſhould have the power of ſaying Guilty or Not guilty, on a libel? The jury, beyond all diſpute.—There could not be two opinions upon it ſtated in this view.

But a diſtinction had been taken, and it was ſaid, *Ad quæſtionem legis non reſpondent juratores, et ad quæſtionem facti non reſpondent judices.* This maxim was a very true, as well as a very plain one. But it was miſapplied. It was not applicable at all to the caſe of a libel. It referred ſolely to the caſe where the law and the fact might be ſeparated, and had no natural connection whatever.—It applied to caſes where the fact was admitted by the defendant as ſtated by the plaintiff, but where the defendant denied the point of law riſing out of that fact as ſtated by the plaintiff.—And this was argued by way of demurrer.—But this was a caſe where there was no *law* ſeparate from the fact—or rather, there was no law at all. The publication was a fact—the intention was ſo connected with fact, that it could only be proved by fact. The tendency was ſo connected with fact, that inference could be drawn only from circumſtances ariſing out of fact.

There was not, nor could there be any thing in the

the nature of a libel, that the moſt ignorant man in England, not being an ideot, could not judge of, as well as the moſt profound lawyer.—A German, or any other foreigner, who knew nothing of our conſtitution, might judge of it. There never was, nor could there be, a difficulty in it. Nothing more was to be judged of, than appeared on the face of it; the natural tendency of the thing.—Why ſhould a man be a lawyer, in order to underſtand Engliſh? The truth, indeed, was, that by theſe diſtinctions, or affected diſtinctions, between law and fact, where there was no law, and the whole was fact, had frequently been the cauſe of juries of a pliant diſpoſition to trifle with the oath they took. They had ſaid, Guilty of printing and publiſhing *only*. Could any man, in his ſenſes, ſay, that ſuch a jury meant, by ſuch a verdict, that the defendant had no criminality, and that he ought not to be puniſhed; and yet, had it not afterwards been ordered by the court, that the verdict ſhould be altered, and that the defendant ſhould be deemed guilty? This pretence for a diſtinction was not known to the ancient law of England; it was of modern date, he believed not above thirty years ſtanding.

He wiſhed to know, what would have been the caſe, if the doctrine that *intention* and *tendency* of a libel were matter of law for the conſideration of

judges, and not for juries, in the time of James the Second?

Here his lordſhip entered into a very able, very clear, forcible, and accurate hiſtorical detail of caſes, determined both in good and bad times, from the time of Bracton, five hundred years ago, down to the time when he himſelf was at the bar; and proved, that the general bent of all the charges which had been given to the jury was, that they were to judge of the intention and tendency of the alledged libel; that they were ſolely to determine the whole caſe. Even Judge Jeffries himſelf had done ſo, and he could not be ſaid to entertain any ſentiments againſt the power of the crown contrary to law. So clear was the point in his mind, that the juries were the whole and ſole controulers of all the caſe of libel—that if all the bench of the courts of law—all the bar, and the unanimous voice of parliament ſhould declare it to be otherwiſe, he ſhould not change his opinion. He wiſhed the Houſe to ſay, with whom ſhould judgment on the effect of libel reſt? Or rather, who ſhould have the care of the liberty of the preſs—the judges, or the people of England? The jury were the people of England. The judges were independent men—Be it ſo. But were they totally beyond the poſſibility of corruption from the crown? Was it impoſſible to ſhew them

them favour in any way whatever? The truth was, they poſſibly might be corrupted—juries never could. What would be the effect of giving judges the whole controul of the preſs? It would ſoon be ſhut up. When ſo ſhackled, nothing would appear that was diſagreeable to government.

As well might an act of parliament be paſſed that nothing ſhould be printed or publiſhed but panegyrics on miniſters and government; with ſuch principles we ſhould ſoon loſe all thoughts of freedom. So clear was he, that even if it were not law, it ſhould be made law, that the juries ſhould judge of the whole caſe of a libel; that he proteſted he thought, that in all the catalogue of crimes, there was not one that was ſo fit to be determined by a jury, and not by a judge, as a libel. He added many other excellent, conſtitutional, and wiſe obſervations on this ſubject, and in favour of the bill now before their lordſhips.

EARL STANHOPE

Entered much at large into the ſubject, and the whole caſe of trial by jury, and maintained, with great force, the propriety of the bill in queſtion. He explained the nature of the conſtitution of this country, and ſupported it againſt the attacks of Mr. Paine; but he deſired it to be obſerved, that it was the conſtitution in its purity that he ſupported, and not the ſyſtem which had been adopted

to deprive juries of their functions. This had been done by the uſurpation of modern lawyers, whom he treated with great ſeverity; particularly ſeveral learned judges now on the bench, and the noble and learned lord on the woolſack, whoſe ſpeech he quoted on the trial of the *King* againſt *Horne*, and maintained it was a contradiction of the preſent avowed ſentiments of that learned lord; ſo that the chancellor of Great Britain to-night muſt pair off with Thurlow the attorney-general of that day. He then quoted a vaſt variety of caſes from the time of Bracton to the preſent, and maintained that all of them which had been touched upon by the noble and learned lord on a former debate, he had either miſunderſtood or miſrepreſented. He took notice of Lord Kenyon's charge to the jury in the trial of the *King* againſt *Stockdale*, which, he obſerved, was more inconſiſtent than the reſt.

He ſtrenuouſly ſupported the rights of juries, and entertained no doubt but that they had, and ought to have, the whole diſpoſal of the trial of a libel. Judges had been corrupt, and might again be more ſo; but juries were the people, and they had no temptation to be corrupt againſt their own intereſt. He reprobated, with great warmth, the behaviour of the judges in the reign of King James the Second, to whoſe invidious advice he attributed the recurrence that was had to the firſt

and

and elementary principles of legitimate government that followed. He deprecated the effect of refuſing to paſs this bill at this time.

He reverted to the various inſtances of tyranny in this country, of the reigns of many monarchs who had been adviſed to treat popular ſubjects with contempt, and maintained that true wiſdom always taught us to look eſpecially at the time in which we lived, and on prevalent opinions, with reſpect. He paid Mr. Bearcroft very high reſpect for the opinion he gave on the trial of the Dean of St. Aſaph, and afterwards in the argument in arreſt of judgment.

His lordſhip, in the courſe of his ſpeech, took a view of the court of chancery, and indulged his humour on the delay of buſineſs in that court, and other imperfections of which ſome ſuitors ſo juſtly complain. He gave a hiſtory alſo of the licenſing of the preſs in the reign of King Charles the Second, and maintained that the judges derived their pretended right to diſpoſe of the queſtion of the tendency of a libel as a matter of law, from the famous principle of licenſing the preſs:—a principle which, if followed up, would indeed make the conſtitution of England no better than the conſtitution of Turkey, and would make the people of England wiſh that the words of Mr. Paine were true—"England has no conſtitution."—This would

ſoon make them ſet about the making of one. But he was convinced their lordſhips would paſs this bill, and render all murmurs and complaints unneceſſary.

LORD KENYON,

In a ſpeech of conſiderable length, defended the profeſſion and profeſſors of the law from the attacks of the noble lord, and complained of their not being liberally treated. Upon the queſtion itſelf, he had not altered his opinion. He was clear that the queſtion of fact and the queſtion of law upon libels were diſtinct—the one was the privilege of the jury, the other of the judge. He believed that if this bill paſſed, and this right was granted to juries, they would make a preſent for which juries would not thank them. It would involve them in a vaſt variety of complicated points, and in great perplexities. His lordſhip then entered into learned arguments in favour of his opinion, and took notice of many legal points in the ſpeech of the noble lord who ſpoke laſt. He ſaid he believed that if he was to talk of fluxions, or of ſome of the works of Sir Iſaac Newton, he ſhould certainly be much out of his element; but he ſhould not be ſo deſtitute of information in that caſe, as the noble lord who ſpoke laſt appeared to be on points of law.

VISCOUNT

VISCOUNT STORMONT

Elaborately maintained the propriety of treating judges and miniſters of the law with the moſt profound reſpect, in order to preſerve in the public mind proper reverence for the law of this country, which, from the acquaintance he had with foreign courts, was the envy of them all. He then entered into a copious detail of precedent and argument in ſupport of his opinion, which was, that juries were totally unfit to determine on any point of law whatever, and that diſtinctions made by the judges were juſt and proper. After having reviewed the arguments, he concluded with diſſenting from the bill now before their lordſhips.

EARL OF ABINGDON

Roſe:—but ſuddenly Lord Stormont, being perhaps overpowered by heat (the Houſe being crowded), fell in a fit, and was carried out of the Houſe.—An adjournment took place immediately.

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## HOUSE OF LORDS.

MONDAY, *May* 21, 1792.

The MARQUIS of LANSDOWNE

BEGAN to reſume the debate on this bill, (which had been adjourned in conſequence of the

the accidental illneſs of Lord Stormont), with ſome very handſome compliments to Earl Camden, who, he ſaid, was the oldeſt friend he had in the Houſe, and who, greatly to his own honour, had cloſed a profeſſional life of more than thirty years continuance with an adherence to the ſame principles with which he originally ſet out. His noble friend, the marquis ſaid, had delivered his ſentiments on the ſubject of the preſent bill, with a force of truth, a brilliancy and a clearneſs of eloquence rarely diſplayed by the moſt able man living, at any one period of his exiſtence; and his noble friend ſeemed now likely to have the good fortune of having his principles engraven on the conſtitution, engraven on the laws of his country. The bill, he declared, was a bill to which he could not but cordially wiſh the fulleſt ſucceſs, becauſe it proceeded on grounds that, from his earlieſt acquaintance with the ſubject, he had been in the uniform habit of regarding as the only rational grounds that the law ought to ſtand upon, in reſpect to trial on queſtions ariſing in caſes of libel.

His Lordſhip ſaid, when the queſtion had been agitated before, it had been agitated with great violence; whereas it had on the preſent occaſion been diſcuſſed ſolemnly, and with ſufficient dignity. His noble friend, as he had before ſtated, maintained the bill at large, and in almoſt every point

of

of view, with unanſwerable arguments, and had ſhewn that the doctrine ſet up in oppoſition to it was a modern doctrine; and the noble viſcount who had oppoſed the bill, had managed his objections to it with ſo much moderation, and conducted what he had to ſay againſt it ſo fairly and impartially, that after what had been already ſaid on both ſides the queſtion, it was extremely difficult indeed for him to ſtate any thing new upon the ſubject, or any thing well worthy their lordſhips attention.

Where judges had acted openly and honeſtly, the marquis declared, they had found juries willing to liſten to their obſervations in matters of fact, and cordially ready to receive their direction in matters of law. He ſtated the direction of the chief baron (Eyre) on the trial of captain Gordon for a murder in a duel; and ſaid, the chief baron had there given his opinion on the law and the fact to the jury, and told them it was their duty to found a verdict on both the one and the other, as to their conſcientious opinion ſhould appear to be right. Such a direction was perfectly fair, and could afford no ground for cavil.

His lordſhip obſerved on the ſixth anſwer of the judges to the queſtions put to them by that Houſe, and commented on it much at length. Having read every part of it, he ſaid it was a clear

reply,

reply, and a reply to which no objection could be raiſed; and if he were to look at the conduct of the judges in that Houſe only, and when called upon to aſſiſt their lordſhips, he ſhould be perfectly eaſy on the ſubject, and ſhould think the bill wholly unneceſſary; but unfortunately they were to be regarded when moving in another ſphere, and it was curious to ſee what the language of theſe very judges was when ſitting in their own courts, acting with more authority, with no eye obſerving, no power to controul their deciſions. With their lordſhips, the judges profeſſed all humility, fairneſs, and the moſt unqualified inclination to act for the advantage of defendants, and with the utmoſt latitude of condeſcenſion to juries.

He could not but remind the Houſe, that it had that day been engaged in inveſtigating a great, a grave, and an important ſubject; and he would venture to ſay, that there was not a captain of a ſlave-ſhip that ſhould come to their bar, who would not willingly profeſs all poſſible moderation and meekneſs, and hold himſelf out as the moſt humane and compaſſionate creature upon earth. His lordſhip ſaid, he truſted no one of the judges would imagine that he meant to compare them with the captains of the African ſlave-ſhips, or put them on a par with them for a ſingle moment. He had no ſuch intention. He really entertained a very ſincere reſpect for the judges; he had

always

always done ſo, and he had manifeſted it on every occaſion that fell within his power. He meant merely to ſhew the difference that time and place made with all men, and to convince the Houſe how different the conduct and language of the judges were when addreſſed to their lordſhips, and when they ſpoke from their own tribunals; and he would trouble the Houſe only with two inſtances in proof of this part of his argument.

The one was the trial of the Dean of St. Aſaph, on the 15th of November 1784, before Mr. Juſtice Buller, at Shrewſbury; the other what paſſed on the motion for an arreſt of judgment in the court of King's Bench on the ſubject of that trial. Upon the firſt, when the judge was appealed to by counſel for the defendant, to know whether the publication was a libel or not? Mr. Juſtice Buller had ſaid, "that as a ſingle judge, ſitting at *Niſi Prius*, it was not for him to ſtate the law, the whole matter was on the record; and God forbid, by an aſſumption of the province of the court on his part, that the ſubject ſhould be deprived of his deareſt birth-rights, the right of appeal for arreſt of judgment, or of appeal on a writ of error, to a ſtill higher court!" The marquis, in terms of the moſt pointed irony, ridiculed the declaration that a right of appeal in arreſt of judgment, and of moving for a writ of error, was one of the *deareſt birth-rights* of Engliſhmen, aſſerting that

it was neither more nor leſs than the being turned over from one ſet of lawyers to another, and from that other to a third. In fact, it was to be turned over from the judge who tried the cauſe, to himſelf and three others, in a ſecond place; and from them to themſelves again, mixed with a few more judges, in a third place! How infinitely preferable, he obſerved, was a verdict of acquittal in the preſent inſtance; and how abſurd was it to hold forth this tedious circuitous road of arriving at juſtice, in the caſe of an innocent man, as the deareſt birth-right of an Engliſhman!

Having puſhed his vein of irony to ſome extent, his lordſhip proceeded to his ſecond inſtance, viz. to the arguments of the judges on the application in arreſt of judgment. He read an extract from Mr. Juſtice Aſhurſt's ſpeech on that occaſion; that judge declared, he thought all the points in the caſe reducible to two. With regard to the juries power to take law into their own hands, as well as matter of fact, he utterly denied it. They had the *power*, he acknowledged, but not the *right*; and he illuſtrated the caſe, by ſtating, that if a man held a piſtol to another's head, he had the *power* to take away his life, but would any man ſay he had a *right* to do it? Juſt ſo the jury were circumſtanced, who had the *power* to give a deciſion on the queſtion of law, but not the *right*.

His

His lordſhip commented very freely on their mode of telling a juryman that he was like a highwayman, and ſaid, it was one among a great variety of proofs, how different the opinion of the judges was, when ſtated to their lordſhips, and when given in their judicial capacity. Having amply diſcuſſed the two precedents, the marquis took notice of the ſong written by Mr. Pulteney, (the late lord Bath) on the occaſion of the acquittal of Franklin the printer, many years ſince, which he ſaid had been quoted by a judge in his court (lord Mansfield) in a different ſenſe from that in which it had been written and underſtood, and relied on as a grave argument in proof of the generally received opinion of the doctrine of libels. His lordſhip ſaid, he muſt have a pretty tolerable degree of confidence in his auditors, and well knew the temper of thoſe around him, before he could have ventured to do ſo extraordinary a thing; but the noble viſcount near him (lord Stormont) had again quoted it the other evening for the ſame purpoſe, and had declared that he had taken pains to quote it from the original edition.

In the preſent rage for ſplendid editions of every man's works, he imagined, his lordſhip ſaid, that they ſhould ſee one advertiſed of Lord Bath's works, when poſſibly the commentator would be puzzled which to commend moſt, the wit and humour with which the ſong had originally been written,

written, or the wit and humour with which it had been related by the noble viſcount; and he declared, he ſhould be glad to ſee what prints Mr. Alderman Boydell would give to this new publication.

They who called themſelves the friends of liberty, his lordſhip ſaid, while they found themſelves buſily employed in forging chains, as they imagined for prerogative, were ingeniouſly forging chains for themſelves. Thus the act which declared the judges independent apparently of the crown, in fact would be found to render themſelves independent of the people, and ſolely dependent on the king. In elucidation of this, the marquis ſtated, that judges were but *men*, and conſequently ſubject to mortal paſſions as other men were. All men, he ſaid, were governed by the paſſions of *fear* and *hope*; take away the former, and then only hope would remain; and how could that hope be gratified but by the favour of the crown?

Before the Revolution, judges ſtood on one ground; but ſince the Revolution, on a different one. Before the Revolution, judges took no part in politics, or the debates of that Houſe; now, they were of great weight in every diſcuſſion, and occupied ſo much of the time of the Houſe in every argument, that the lords could ſcarcely get opportunity of ſpeaking. For what they knew, they might have a chief juſtice at the head of a

party

party in that Houſe, going down reeking with party rage to his court, to preſide on a trial for a libel againſt himſelf, written by ſome political adverſary. Could ſuch a man avoid being partial and free from bias? It was not in human nature. But, he ſaid, he did not grudge the higheſt honours of that Houſe to men who had riſen from low ſtations by the continued exerciſe of legal abilities. It was right that thoſe ſituations ſhould be open to them, and he was glad to ſee them among their lordſhips.

Before the Revolution, he ſaid, there had been a pretender to the throne, and a different family laying claim to it, and all that time the king was the greateſt republican in his kingdom. That family had died away and become extinct, and we could only expect to ſee the characters of kings come out, when they had no rival to dread. As far therefore as depended on judges, all the miſchiefs that had ſprung from corruptneſs of the judges might occur again; we had ſeen a Jefferies, and we might ſee another, unleſs the wiſe precaution neceſſary to guard againſt their occurring, was taken in time by the legiſlature.

He deſired to know what the caſe was on a general iſſue, where juries could be ſtated as incompetent to give a general verdict compoſed of the law and fact blended together, as muſt inevitably be the caſe in all general verdicts. He called upon the judges, not to ſtate him a precedent of

ſuch a caſe, becauſe he was pretty ſure no ſuch precedent was to be found; but let them frame ſuch a caſe, and ſee whether it would bear an argument. He declared for his own part, he could not frame any caſe to his mind, in which juries did not appear as fully competent to decide conſcientiouſly upon the law and the fact blended, as the twelve judges, and much more than any four of them. He ſaid, he did not blame lawyers for making a ſtand againſt the preſent bill: it was well worth a ſtruggle on the part of the profeſſion. It was a proud, ambitious profeſſion, deſirous of obtaining power over all; and if the noble lord at the head of the King's Bench could overthrow it, as his lordſhip had ſtudied politics as well as law, he would be Lord Paramount of England. The proudeſt of their lordſhips muſt bend ſubmiſſive to his nod.

Before they decided againſt the bill, however, which he flattered himſelf would not be the caſe, let them look at what had happened in Rome, as ſtated in the luminous pages of the ableſt hiſtorian that ever graced his country *, and they would ſee that the very ſame conduct purſued by thoſe who meant to abuſe power, when they could completely graſp it, was what the judges had at all times purſued. At one time, they appeared to be eager to obtain it; then they let it go; then they

* Gibbon.

affected

affected to be alarmed for fear thoſe to be tried ſhould be injured; and had acted as the noble and learned lord at the head of the King's Bench had done when he ſtated himſelf to be, in the former debate, ſo tender to the ſubject, that he only wiſhed for the power, that they might protect the ſubject in caſes of trial for libel, from being haſtily delivered over to judgment by the ignorance of juries. Thus they were one day all tyranny, the next all humility; but their deſign all along concealed the ſame poiſon, the ſame ſting, the ſame arrow lurking at bottom; and no doubt when firmly eſtabliſhed, the ſame would happen as at Rome, for they all knew that Rome never ſaw a day's liberty afterwards, and what was worſe, not a ſingle family knew an hour's peace.

What might not happen, his lordſhip aſked, if the legiſlature did not prevent it? If God Almighty, in his mercy, were to ſend among us another Locke, or another Monteſquieu, he doubted not but they would be deemed libellers. Let noble lords conſider what had happened. He remembered, when in office, having found in the ſecretary of ſtate's office, a note that a paper was to be proſecuted for having ſaid *that the king had got a cold.* And though were ſuch a proſecution inſtituted now, a jury, he was well aware, would laugh at it; yet it was not altogether ſo unreaſonable at the time, for the Pretender was in

the country, and in force; it was highly neceſſary to take care that not even the ſlighteſt diſreſpect ſhould be ſhewn to his majeſty. But the law itſelf was daily fluctuating, and the judges were changing their opinions, and he did not blame them for it. The law and its practitioners muſt bend to the temper of the times. As a proof of it, he ſaid, he would ſtate a caſe, and he was not afraid of going out of his depth in citing it; it was a caſe concerning covenants, and how far the violation of covenants did or did not operate in the voidance of leaſes.

[Lord Kenyon happened to whiſper Lord Loughborough in this part of Lord Lanſdowne's ſpeech, at which the latter took a momentary offence, and deſired not to be interrupted, but to be anſwered afterwards.]

The noble and learned lord, the marquis ſaid, was ſo captious, that he thought he was attacking him, whereas he was attacking no one. Judges muſt follow opinion; he had ſaid ſo, and he thought ſo ſeriouſly. His lordſhip then went into ſome general obſervations on the bill, which he commended highly for its principle, but took notice of the noble viſcount's having complained that it was obſcurely worded. If that were the fact, let it go to a committee, ſaid the marquis, and in God's name make it clear. But he hoped the bill was to be a ſingle meaſure. If there was

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any intention of paſſing a code of libel laws, he deſired that ſuch a code might ſtand by itſelf, and not involve the preſent bill. He declared he was perſuaded that juſtice on trials of libel would be more ſubſtantially done, if the law and the fact, in caſes where a general verdict was to be given, were left to juries. Let their lordſhips look back to the Roman hiſtory, and they would ſee, that when the people of Rome had the power to chooſe plebeians magiſtrates, they almoſt always choſe patricians.

His lordſhip ſaid, in a large manufactory belonging to a near relation of his, that relation had introduced the trial by jury among his workmen; and he had aſſured him that the only ill effect was, that the juries were rather too ſevere in their deciſions. A captain of a man of war, likewiſe, a moſt reſpectable character, though he had not the honour to be acquainted with him, had done the ſame on board his ſhip, and there the effect was ſtated to be the ſame. The juries were rather too ſevere. It was clear, therefore, no danger was to be dreaded from it; on the contrary, he was perſuaded conviction would be more ſecure, where the intention, which muſt, as the noble earl who opened the debate had ſtated, be proved, and go along with the facts to the jury, was eſtabliſhed; and the judge would have fifty times the thanks

where he ſaid to a jury, " There, Gentlemen, it reſts on your hands to do juſtice to your country."

The marquis having enforced the propriety of the principle of the bill by a variety of arguments, ſpoke of the preſent times, not as times of the alarm that they were generally deemed; and declared he had been ſurpriſed at hearing ſo much ſaid of a little paltry book, a pamphlet by Mr. Paine, which he had read juſt with as much feeling as he had read ſome miſerable abuſe of the ſame nature, and from the ſame pen, upon himſelf at the time of the negociation with the Americans, which, if he had been at all irritable, and had not treated it with the moſt ſovereign contempt, might have had ſome ill effect on the negociations, and broke off the treaty, and kept the peace at a diſtance. If the late pamphlet of Mr. Paine had been treated with the ſame neglect and indifference, he was ſatisfied, his lordſhip ſaid, that it would have ſunk into utter contempt by this time. He mentioned, that he found Mr. Paine had lately republiſhed his attack upon him, imagining, he ſuppoſed, that every thing from his pen muſt be of importance, however replete with miſrepreſentation and ſcurrility. But if Mr. Paine and his works were treated with proper contempt by reaſonable men, they would die neglected and deſpiſed; and it would not be in

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the power of Mr. Paine, and thoſe who promoted his publications by their anſwers, in which one main object was to tell the reader what great men they were themſelves, to do any harm. The country, his lordſhip ſaid, had too much good ſenſe to be troubled by ſuch traſh.

There were, the marquis believed, three diſtinct claſſes of people in this country. One, and that a very ſmall one indeed, who wiſhed to attack the conſtitution itſelf, and introduce anarchy and confuſion; another, made up of thoſe time-ſerving beings, who followed every adminiſtration, and were for patching up every defect by corruption, and plaiſtering it over with venality; and a third, of which he profeſſed himſelf to be one, conſiſting of moderate men, who were ready to adopt meaſures of temperate reform, in order gradually and gently to correct whatever was defective. This latter claſs he hoped was by far the moſt numerous of the three; and if men of the moderate claſſes were attended to, he was convinced this country would be quiet, moſt eſpecially if matters were left to juries.

One thing, his lordſhip ſaid, the country had ſhewn to a degree of prejudice that was aſtoniſhing, viz. their loyalty to the King, and their affection to the Houſe of Lords. Within the laſt ten years it was impoſſible for any people to have ſhewn more loyalty to the reigning monarch, who

owed them every thing for their love and eſteem of his perſon and family; and ſuch was their reverence for that Houſe, that the firſt thing that ſhook the French revolution in the opinion of this country, was the abolition of titles. His lordſhip took occaſion to ſhew the neceſſity of their continuance to exiſt with us, and ſpoke of the Houſe as the pureſt ariſtocracy that could be put into exiſtence; ſince their honours, titles, and privileges, could only deſcend on the eldeſt ſon, who alone had a right of ſitting and voting in that Houſe; a degree of democracy was neceſſarily infuſed in every noble family throughout the kingdom, and the general intereſt united and ſtrengthened.

His lordſhip concluded with recommending it to the Houſe, to keep and continue the good humour the people were now in, by acknowledging and admitting their moſt invaluable right to the poſſeſſion of all the benefits of a trial by jury, and by having an open and unreſerved confidence in ſuch an honeſt people as the people of this country undoubtedly were.

LORD KENYON

Roſe to apologize to the noble marquis, for having accidentally interrupted him, which he hoped was not any way unpardonable, as he had intended no offence whatever. Not immediately recollecting the cauſe to which the noble marquis alluded,

alluded, when he had ſaid, the judges had recently changed their opinions, he had merely aſked the noble and learned lord near him if he could recollect it, for he profeſſed not to do ſo himſelf.

The MARQUIS of LANSDOWNE

Roſe to explain; and ſaid, he was not a little proud to be able to inſtruct the noble lord on a point of law. That the caſe to which he alluded, was the caſe of a tenant in Norfolk, who had taken a leaſe of an eſtate, on a part of which there was a piece of furze; and he had entered into a ſpecial covenant that if he ploughed up that furze, he was to pay an additional five pounds per acre rent. He did plough it up, and the noble earl who was then ſitting below ſtairs, conſidering that the ploughing up the furze had done more good than harm to the eſtate, had decreed that it ought not to void the leaſe, although it had been ſo previouſly covenanted. It came up into that Houſe by appeal, and Lord Mansfield then ſitting there had reverſed the decree, which he recollected had made Lord Camden very angry at the moment. His lordſhip concluded with remarking what a miſerable conduct the adminiſtration of the law depended on, when ſo inſignificant a perſon as he was, could give his opinion on a point of law, and inſtruct the noble and learned lord.

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The EARL of LAUDERDALE

Began a very elaborate ſpeech, with profeſſing his intention carefully to avoid any thing like an attack on the judges perſonally; declaring, that his duty as a member of that Houſe, and a peer of parliament, required no ſuch attack, although he had a right and it was incumbent on him to diſcuſs the doctrines maintained by the judges, both in their anſwers to the queſtions ſtated to them by the Houſe, as well as the arguments of the noble and learned lords who had delivered their ſentiments on the bill in the courſe of the debate.

His lordſhip, after a long exordium to this effect, declared his conviction that the bill ought to paſs, and that he could collect enough from the anſwers of the judges to warrant him in declaring, that what they ſtated was ſufficient to ſhew their lordſhips that the bill was abſolutely neceſſary and highly proper to paſs. His lordſhip ſaid, his wiſh was to eſtabliſh uniformity in the criminal law of England; but in treating the ſubject, he would not ſay what might hurt a noble relation of the noble lord near him (Lord Stormont), who belonged to a profeſſion for which Lord Lauderdale declared he was early intended, and of which he could not ſay too much. He did not wiſh to aim at thoſe landmarks of the law and the conſtitution,

ſtitution, of which the noble and learned lord, who ſo worthily preſided over the King's Bench, had ſaid ſo much on a former day.

Having made this declaration, his lordſhip proceeded to canvaſs the anſwers of the judges, which he commented upon at very great length. In their anſwer to the third queſtion, the Earl declared, he found more alarming doctrine than he had ever heard: he was to collect from that anſwer, that in the opinion of the judges, the intention was no part of the crime. His lordſhip argued againſt this, and contended, that the intention was not matter of law, but matter of fact, and fit for the jury to decide on by their oaths, being ſworn to decide on evidence, as the judge was ſworn to decide on law. With regard to that part of the anſwer of the judges, in which they talked of ſcattering fire-brands, arrows, and death, and ſaid, no man ſhould ſay, "Am I not in ſport?" his lordſhip ſaid, every day's experience proved that in caſes of murder, where the defendants were ideots, lunatics, or infants, they were allowed to ſcatter ſuch arrows with impunity, upon its being proved that they had no criminal intention; and therefore, if it was the law of England, that in caſes of murder, and in every other caſe, intention forms a part of the crime, why ſhould it not in libellous caſes? His lordſhip, in the courſe of his argument, quoted the trial of the King againſt

Horne,

Horne, and the King againſt Topham, where Lord Kenyon had left the intention to the jury.

After deſcanting at conſiderable length on each of the caſes cited, his lordſhip ſaid, he muſt contend for the deſtruction of that anomaly of the law, which exiſted in no other caſe, namely, the cuſtom on trials of libels of calling on a jury for a verdict from premiſes, which premiſes had not been ſuffered to go before them. His lordſhip took notice of what had been ſaid by Lord Stormont, relative to the law of Scotland, and ſtated the famous caſe of a perſon tried for the murder of a peer, by taking up a ſtone and throwing it at him, which hit the noble lord in the neck, and occaſioned his death, as a clear proof that a Scotch jury judged both by the law and the fact; ſince after the judge had in the firſt inſtance told the jury, that in law, the libel was relevant, and the crime imputed to the pannel was murder, the jury acquitted the priſoner, and pronounced a general verdict of *Not guilty*.

His lordſhip analyſed the conſtituent heads of an information for a libel, which he ſtated to be four; the two firſt, the *writing* and *publiſhing*, he ſaid, he believed were always conſidered as matters of fact. The two others, viz. the *tendency* of the writing charged a libel, and the intention, he ſaid, were deemed matters of law; but he adduced many arguments to prove, that the two latter were as

eſſential

eſſential for the conſideration of the jury, as the two former; and that as the practice at preſent obtained, any man might be brought into court and convicted of having publiſhed, where the ſubject matter had no criminality whatever. He declared, he wiſhed the judge to have the ſame latitude in caſes of other crimes, that he had in caſes of libel, but no more; and he obſerved, that the beſt poſſible government might afford means for its deſtruction, if not conſtantly watched and guarded. He believed it, and therefore he was not a little anxious that the liberty of the preſs ſhould exiſt free and unfettered. He was, he ſaid, as much its friend, as he was hoſtile to its licentiouſneſs.

The liberty of the preſs was the beſt guard againſt corruption, and therefore it was eſſential to the preſervation of the conſtitution that it ſhould exiſt. At preſent, the judges were men of great wiſdom, integrity, and reſpect, men deſerving the confidence and eſteem of the public; but the time might come, when they might be of another deſcription, when, if the conſtruction of all matters of law were left to them, the liberties of the people would be in bad cuſtody, and might be ultimately deſtroyed.

His lordſhip paid Mr. Fox very high compliments as author of the bill, and as a man who, ſo far from being influenced by any perſonal motives,

motives, never harboured malice in his breaſt againſt any man. His lordſhip contended, that thoſe judges who maintained and acted upon the doctrine that *ad quæſtionem juris reſpondent judices, ad quæſtionem facti juratores*, in its purity, as it was contended for, acted unfairly by the ſubject; and thoſe who acted otherwiſe, fell into deviations, and that ſuch contradictory proceedings ought to be cured and corrected.

LORD PORTCHESTER

Said, his noble friend had ſo amply diſcuſſed the whole ſubject, that he ſhould have contented himſelf with giving a ſilent vote, had he not propoſed two of the queſtions to the judges, upon which, he was ſorry to ſay, he had got no anſwer whatever. In the anſwers he had been diſappointed in finding that the judges had been unanimous. He owned he had expected ſome difference of opinion; and the unanimity of the judges he regarded as an ill omen, becauſe it proved that the anſwer was qualified and ſhaped ſo as to meet the different ſcruples of the judges. He proceeded to diſcuſs the anſwer to the firſt of the two queſtions that he had propoſed, viz. the third. The firſt paragraph of the anſwer his lordſhip declared to be perfectly ſatisfactory; but the next paragraph, in which the judges add, "that no caſe had occurred, in which it would

" have been, in ſound diſcretion, fit for a judge, " ſitting at *niſi prius*, to have given ſuch a direc- " tion or recommendation to a jury," totally undid their declaration in the preceding paragraph, and left his queſtion without any anſwer whatever. His lordſhip argued the anſwer much at length; and afterwards that to his other queſtion, complaining, that in neither caſe had the judges given an explicit anſwer, nor an intelligible one. The jury, on oath, were to give a verdict according to their conviction; and where was the propriety of directing them, when their own conviction was to decide on the whole caſe? Much had been ſaid of inferences of law; he ſhould not at all wonder if they were applied to every poſſible ſubject bye and bye. An arithmetician might be told, " your table of calculation is an inference of law from figures." A muſician, " your tune is an inference of law from ſimple ſounds," and ſo on to every art and ſcience in exiſtence.

The conſtitution, his lordſhip contended, had left to a jury the deciſion of the queſtion of crime or no crime, and it was the right of every Engliſhman to be tried by a jury, and acquitted or found guilty by them. No ſubtlety of a judge, therefore, ſhould be ſuffered to do away that right, and ſubſtitute in its ſtead a trial by the judge. He thought there was a clear neceſſity of proving

proving the intention of the perſon charged with a crime, his guilt or innocence depending wholly upon it; and believing as he did, that a jury was competent to decide upon the whole of the caſe, viz. the facts of writing and publiſhing, and the tendency and intention, he declared he ſhould be of opinion, that if it were not law already, it might be made ſo, and to be ſo made henceforward. With regard to the temper of the times, he feared it, but he thought they ought on that account to paſs the preſent bill. He ſaid, he was glad to ſee ſo many of the reverend prelates preſent; he relied on their ſupport on principles of gratitude, for the reverend bench never ſurely could forget, how much their anceſtors had been indebted to an Engliſh jury, when the ſeven Biſhops nobly ſtood up the champions of liberty. He flattered himſelf, therefore, that they would aſſiſt in repelling an attempt to reduce trial by jury to a mere form.

The LORD CHANCELLOR

Left the woolſack, and began a very long ſpeech replete with legal knowledge, with declaring that the queſtion before the Houſe was, whether, after all that had paſſed, it were neceſſary that the bill ſhould go forward? His lordſhip ſaid, it was totally impoſſible to combat the arguments of the advocates for the bill, without knowing what it

was

was to do; if it were to paſs, they ought to ſhew how the law ought to ſtand. The bill went, that no defendant ſhould be found guilty merely on the proof of publication. That, the Houſe would ſee, was a mere negative propoſition. If no new advantages were to be gained by it, if the law were to ſtand in the ſituation that it then did, in that caſe the argument would come to a very narrow compaſs, if they were ſure it was the only ground. But the judge was to do ſomething more; and what more was he to do? Why, the noble and learned earl, for whoſe talents and whoſe character altogether no man entertained a more ſerious reſpect than he did, had opened the debate very ably, and in a manner that did him infinite honour, and for which he returned him his ſincere thanks. That noble earl had ſaid that the judge ought to declare the law to the jury, and that they ſhould decide both on the queſtion of law and the queſtion of fact.

His lordſhip declared he did not know a more dangerous principle, nor a principle more oppoſite to every thing he had learned from the firſt moment of his coming into the profeſſion, up to the preſent day.—The great and indiſpenſable rule that he had ever known as the leading principle to go by in all trials for libel, his lordſhip ſaid, had been the well known maxim, *ad quæſtionem juris judices, ad quæſtionem facti juratores.* His lordſhip took notice of the manner in which the judges

in general had been treated in the courſe of the debate, and particularly Chief Baron Eyre, Mr. Juſtice Buller, and Mr. Juſtice Aſhhurſt. He declared, he thought they had been treated rather hardly and unfairly, becauſe certain he was, that they had acted in ſtrict conformity to thoſe eſtabliſhed rules of law that had governed the courts in the time of their anceſtors, and in an uninterrupted courſe, as had been before ſeen from precedents reported by lawyers and judges of the moſt profound learning and indiſputable authority, from the days of Queen Elizabeth to the preſent hour.

A noble marquis, for whom he entertained a very ſincere reſpect, had ſet out with laying down ſome poſitions, his lordſhip ſaid, that appeared to him to be ſo juſt and wiſe, that when he heard them, he flattered himſelf that it would have been impoſſible for him to have differed from the noble marquis; but, in the ſubſequent part of his ſpeech, the noble marquis had gone as wide from his firſt poſitions as it was poſſible for a man to go. His lordſhip ſaid, that juries had undoubtedly, in certain caſes, a power to give a verdict compounded of law and fact, and that was, where they gave a general verdict; in which caſe it was impoſſible for a court to know whether they formed their verdict on facts only or not. His lordſhip declared, he had been glad to hear what had been ſaid of ſpecial verdicts, becauſe they were undoubtedly the ſpecies of verdicts to which juries

under any embarraſſment might reſort with ſafety; as they then returned the facts only, and left it to the judges to find the law upon thoſe facts.

His lordſhip ſaid, the law, according to the maxim he had quoted, was ſolely and excluſively the province of the judge to decide on, and it was impoſſible for the judge to give the law wrong, he meant with regard to its ultimate operation; becauſe the queſtion was, whether the law of any queſtion could have more certainty from a final reſort to ſuch a houſe as that, than from a jury pronounced raſhly and without legal knowledge. In order to prove that the judges always exerciſed their right to decide upon matters of law, in every caſe that came before them, and moſt frequently for the advantage of the ſubject, his lordſhip inſtanced a caſe of a man who was arreſted for debt and taken in execution, and who died in priſon; his creditor in that caſe brought an action againſt his executor, although he had had his body: the plea ſet up was, that he died in execution, having been taken by a *capias ad ſatisfaciendum:* the jury however found a verdict of a contrary nature, it appearing to them that he was not taken by a *capias ad ſatisfaciendum*; that a *non eſt inventus* was returned to that writ, and that he was afterwards taken upon an *alias capias.* The court corrected the verdict on principles of law, and the jury's finding went for nothing.

His lordſhip took notice of the irony with which Lord Lanſdowne had treated Mr. Juſtice Buller's obſervation on the importance of the power of appeals and writs of error, and declared he had always been taught the right of ſubjecting the deciſion of one court to the reviſion and inveſtigation of others, as a matter of infinite importance to the ſubject. In all ſpecial verdicts, the difficulty goes to the judges, and ſurely it was more ſafe in their hands than in any others. Speaking of the legal deciſions prior to the Revolution, he ſaid, that even in thoſe times, when judges were not independent, the ſtream of juſtice ran with remarkable clearneſs; and he ſpoke of the education, habits, and profeſſion of judges, as likely to faſhion them better for purity, accuracy, and clearneſs of ideas, than any thing elſe whatever. If theſe were not the means of making men pure, his lordſhip declared he did not know what would. He alluded to Lord Stanhope's argument of Friday, which he ridiculed with conſiderable pleaſantry, declaring that he marvelled at the noble earl having the nerves, that would allow him for ſo many hours together to go on quoting books, precedents, and caſes of bills of exceptions, demurrer, &c. of moſt of which, in point of application and meaning, the noble earl had not a ſingle apprehenſion. It was an undoubted proof of the goodneſs of his conſtitution, and the excellence of his nerves; and

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he ſaid he would not be ſo malicious as to remember a joke for two days together, and that he freely forgave the noble lord for the liberties he had been pleaſed to take with him, although he had charged him with having miſquoted Hale and various other authorities: the noble earl however had done him the juſtice to give him his revenge by reading the paſſages in queſtion, whence it was evident to all their lordſhips, that he had correctly quoted the ſubſtance of the caſes. After diſmiſſing this retort, his lordſhip quoted Mary Mitchel's caſe, and a variety of others in the reign of Queen Elizabeth, from the State Trials and many other learned authorities. His lordſhip ſaid, it was neceſſary to underſtand theſe caſes correctly, as they were in an eminent degree explanatory of the ſubject of proceedings in matters of libel.

He enlarged very conſiderably on this part of the ſubject, and detailed the trial of the Seven Biſhops, and the language of Judge Holt in Touchin's caſe, where one of the judges, hearing Holt ſay that he preſumed his brothers would ſtate their opinion, was going into facts, when Holt interrupted him, and ſaid, "Hold, brother; I deſired your opinion on a matter of law; I did not deſire you to ſum up to the jury for me." Having travelled through many caſes, his lordſhip took notice of what the noble marquis had ſaid

reſpecting Lord Bath's ſong, which was written in ridicule of as reſpectable a judge as ever ſat on the bench, viz. Lord Hardwicke; and declared, that nothing that could be ſaid to diſcredit either that noble earl or Lord Mansfield, could perſuade him that the Houſe was either wiſer or more capable to decide upon ſuch a queſtion as the preſent, on account of the abſence of thoſe two noble and learned lords. He remonſtrated in a moſt ſtrenuous manner againſt altering any part of the eſtabliſhed practice of the law, as likely to lead to the moſt miſchievous conſequences. He remarked upon the compliments that had been paid Lord Camden, and ſaid, the moſt unequivocal compliment that could be paid that noble earl, was, his having relinquiſhed the conteſt that he had maintained with Lord Mansfield on the preſent ſubject, and appearing to have been convinced, when the noble earl (Lord M.) had laid a paper on the table, ſtating the ſort of directions which he had given to juries in caſes of libels, and deſiring, if they were found fault with, that they might be fairly and openly brought under diſcuſſion.

The MARQUIS of LANSDOWNE

Roſe to explain two or three points which had fallen from the noble and learned lord, and were material

material to be ſet right. With regard to Earl Camden's having yielded the point on the occaſion of Lord Mansfield's having put his paper of reaſons for his conduct in caſes of libel upon the table, the marquis ſaid, to his certain knowledge that had not been the caſe; his noble friend had conſtantly maintained his principles, and on the occaſion referred to had ſubmitted ſpecific anſwers to each part of Lord Mansfield's paper to their lordſhips' conſideration. His noble friend, his lordſhip ſaid, had in his opinion infinite merit in foregoing to puſh the conteſt at the time in queſtion, as the ſeaſon had then been moſt unapt for ſuch a controverſy. His lordſhip aſſigned matters of an explanatory nature in anſwer to the Lord Chancellor, and particularly paid Lord Manſfield ſome compliments for the civil and proper way in which he had received many attacks from him in the ardour of his youth, when, perhaps, much of what he had ſaid had been improper; but on thoſe occaſions, the noble and learned earl, he declared, had always treated him like a gentleman.

LORD LOUGHBOROUGH

Roſe and apologized for being obliged at that late hour of the night to trouble their lordſhips; but on a queſtion of ſuch importance it became his indiſpenſable duty to ſtate his ſentiments upon

it. After an exordium to this effect, his lordſhip proceeded, in a moſt eloquent ſpeech of three hours continuance, to explain the grounds on which he ſhould ſupport the bill; and he began with ſtating in expreſs terms, that the judges had ſatisfied him, from the anſwers given by them in the paper on the table to the queſtions put to them, that a bill ſhould be brought in *declaratory* of the law on the trial of libels. The idea of this bill was by no means a new one, nor was it merely, as the noble and learned lord who ſpoke laſt had ſtated, a queſtion that had been agitated and diſcuſſed by young men, while ſtudents, and juſt learning the elements of their profeſſion.

As long as he could remember it had been the ſubject of conteſt, and its principles had been aſſerted and maintained with eloquence and argument, by men of the higheſt character and moſt acknowledged abilities, both at the bar and on the bench: he need not enumerate them; it was ſufficient to mention Mr. Dunning (the late Lord Aſhburton) and Mr. Serjeant Glynn, as two of the former, and the noble and learned lord at the head of his majeſty's councils, as the leader of the latter. It conſequently could not be conſidered as any innovation introduced by ſurpriſe. Lord Loughborough, after farther obſervation upon the long exiſtence of the doubts, ſaid he could not but conſider all the arguments that had been urged

againſt

againſt the bill as originating in error, and, on that account, in many inſtances proceeding to abſurdity in concluſion and groſs miſapplication. He ſaid, in the courſe of the debate almoſt every noble lord who had objected, had reaſoned as if a trial for a libel had always been held at *Niſi Prius*, and conſequently by a ſingle judge upon a record ſent down by the court. The fact was notoriouſly otherwiſe: when a trial for a libel proceeded upon an indictment, the judge was then bound to ſtate the law to the jury, as well as the facts adduced in evidence, and the jury neceſſarily decided on the combined queſtion of the matter of law and the matter of fact. He reminded their lordſhips, that the ſame powers which they thought from motives of prudence ought to veſt in the judges of the higher courts of juſtice, muſt equally veſt in individuals of a very different deſcription :—

At the Old Bailey, an alderman of London was as competent to ſit and act as a judge in a commiſſion of oyer and terminer and gaol delivery, as the firſt of the king's juſtices in Weſtminſter Hall. Nor was it at the Old Bailey only (whence they could not be removed to any other court) that indictments for libels were triable, but at Hicks's Hall, or rather the Seſſions Houſe in Clerkenwell; and not only in London and Middleſex, but juſtices of the peace at a quarter ſeſſions

ſions in the country, were competent to try libels. Would their lordſhips therefore think it altogether wiſe to entruſt ſuch large diſcretionary powers with juſtices of the peace, as ſome noble and learned lords now contended ought to be ſuffered to remain in the hands of the judges ?

A libel was ſaid to be a crime; if it were ſo, his lordſhip declared it was the judge's duty upon the trial to ſtate what a libel was, and not call for a verdict from the jury firſt, and ſay to them, "When I come to paſs judgment, you ſhall then know what ſort of a crime it is." The word libel, his lordſhip obſerved, was not of itſelf definitively the deſcription of any crime whatſoever; it was the more neceſſary therefore to ſtate it to the jury on the trial, ſince it was not conſiſtent with common ſenſe to convict a perſon of a crime where no criminality had been proved. His lordſhip ſaid, in all his reſearches he could find but one rule applicable to libels, viz. that to make them an object of proſecution, they muſt be ſtated to be ſeditious, and calumniatory either on magiſtrates, or the government of the country, or individuals. In order to make out a caſe, the tendency and the intention muſt be proved; it was not enough to prove that the perſon accuſed had committed the fact of printing and publiſhing; it muſt alſo be proved that the paper or writing had a tendency to reflect, in a ſeditious, ſcandalous, and calumniatory

tory manner on magiſtrates, the government of the country, or individuals, and that the perſon publiſhing it did it with an intention of caſting a ſeditious, ſcandalous, and calumniatory reproach on magiſtrates, the government, or individuals.

His lordſhip ſaid, one abſurdity was uſually led by another; that he had ſhewn that libels might be tried by juſtices at a quarter ſeſſion; and it was notorious that moſt of the ſpecial juries in the court of King's Bench in Weſtminſter were juſtices of the peace, ſo that the very identical individuals who had ſat as judges one day upon a queſtion of libel, might the next be converted into jurymen, and deemed incapable of underſtanding that matter of law which it had been their duty to diſpenſe the preceding day. After moſt amply diſcuſſing the leading principles of the immediate ſubject, Lord Loughborough apologized for finding it neceſſary to go much at large into the conſideration of various points, that were pertinent to what did not bear upon the queſtion under diſcuſſion, immediately.

He combated the Lord Chancellor's ſtatement of the different precedents to which the noble and learned lord had alluded, and ſtated grounds on which he thought the noble and learned lord had either miſconceived or miſapplied the caſes. He particularly enlarged on the opinions of Sir Matthew Hale and Chief Juſtice Holt, in reſpect

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to the caſes of the Seven Biſhops, and of Touchin. He alſo quoted Mr. Juſtice Keeling, and the comments made by Holt, and other ſubſequent commentators, on particular objections of Keeling, and the difficult points of law that had occurred on various occaſions in his time.

He cited the opinions of Baron Forteſcue, Mr. Juſtice Forſter, the Year-books, and various other of the more modern authorities and reporters, and reprobated the caſe of Udall, from the State Trials referred to by the Lord Chancellor, ſtating it to be an inſtance of the moſt groſs, ſcandalous, and glaring abuſe of power in judges, that could be adduced. After purſuing this part of his argument for near two hours, and diſplaying abundant knowledge of precedents, which could not have been acquired without the ampleſt exertion of reference and reſearch, his lordſhip ſaid, though he had not half gone through the ſcope of argument, obſervation, and reaſoning that he meant to have taken, he would ſpare their lordſhips any further tax upon their patience, and content himſelf with declaring, that he conceived all muſt agree that the bill ought at any rate to go to a committee.

LORD KENYON

Came forward very ſhortly, to obſerve on two or three particular points that had fallen from the noble lord, that were extremely material, but declared

clared he would treſpaſs for a very few minutes only on the patience of the Houſe. His lordſhip then conteſted ſome of the caſes cited by Lord Loughborough, and expreſſed his ſurpriſe that the noble and learned lord, with a head ſo accurate, and an underſtanding ſo acute as his was, ſhould have forgotten to ſtate certain points which he mentioned. His lordſhip alſo anſwered what Lord Loughborough had ſaid reſpecting trials of libels by juſtices of the peace, at quarter ſeſſions in the country; and ſaid the commiſſions under which juſtices of the peace, by far the moſt uſeful magiſtrates in the kingdom, were conſtituted, originated above five hundred years ago, in the reign of Edward the Third, and contained a ſpecial proviſion in them, that all the more arduous matters of a judicial nature ſhould be referred to the higher courts, and at any rate they were reviſable upon appeal by *certiorari* to an Examen in the court of King's Bench. His lordſhip deſired the Houſe, before they voted for the bill's going any farther, to conſider to what an extent the bill would go if they decided in its favour; that they would have no authorities to refer to as a ſecurity for their lordſhips' eſtates, an argument which he earneſtly preſſed on their lordſhips' conſideration.

LORD GRENVILLE

Promiſed to ſtate his arguments in ſupport of the

the bill very ſhortly; but he wiſhed to inform their lordſhips of the grounds on which the bill had originated, the arguments that chiefly induced him to contend for it ſtrenuouſly, and the reaſons why thoſe arguments appeared to him to be irreſiſtible. His lordſhip ſaid, a practice had of late obtained for judges on the trial of queſtions in caſes of libel to tell juries, that they had nothing to do but to find the facts of printing and publiſhing, and to leave the whole of the other conſiderations to them. If this practice had not lately obtained, Lord Grenville ſaid, it had at leaſt drawn the public attention to it more than it had formerly done, and there prevailed a pretty general opinion againſt it. So convinced was he of its impropriety, his lordſhip ſaid, that if it could even be proved to him that it was the eſtabliſhed law of the land, and that all the precedents, in all times and under all circumſtances, ran in one uniform ſtream in its favour, ſtill he ſhould be of opinion that it ought to be put an end to.

His lordſhip ſaid, that ſo convinced was he, that the practice ought not to exiſt under the circumſtances of the preſent times, that he ſhould ſtrenuouſly have ſupported the preſent bill, had the arguments in its favour been leſs forcible. His lordſhip declared, that, were it an enacting bill only, he was ready to vote it immediately, and in that caſe there would ſolely have remained the

policy

policy to have diſcuſſed a queſtion which it would have been extremely eaſy to maintain. Lord Grenville complimented the noble and learned earl who had opened the debate, and Lord Loughborough alſo, for the able manner in which he had defended the bill, and ſo juſtly and eloquently ſtated its principles.

He wiſhed Lord Kenyon had gone more fully into the diſcuſſion of his objections, being perfectly conſcious that they were capable of receiving an anſwer, and that the abuſes in the practice of the courts which the bill went to correct were ſo enormous, that the bare ſtatement of them would be ſufficient to convince every unprejudiced man, that the bill ought to paſs. His lordſhip inſiſted upon it, that in all crimes the intention was an eſſential point. In murder, the moſt flagrant of all criminal caſes, it was not only neceſſary to prove the killing a man, but the intention to murder him, to make it murder. So, in caſes of libel, a man might write a letter againſt a magiſtrate, which might, at firſt ſight, appear to be ſeditious and ſcandalous, but which, upon further inveſtigation, might be found to be no libel, but a letter written with an intention worthy of a good ſubject.

In Stockdale's caſe, his lordſhip ſaid, the publication and innuendoes were admitted, but the jury had, nevertheleſs, given a verdict of *Not Guilty*, and muſt conſequently have decided both

on

on the law and the fact. It was, he ſaid, the duty of the jury to take into conſideration the whole of the premiſes on which they were to find a verdict of *Guilty*, or *Not Guilty*. The conſtitution, he was ſatisfied, muſt have intended that juries ſhould poſſeſs the whole power combined, the twofold conſideration of the law and the fact; and ſeeing the ſubject in that point of view, he ſhould agree to a bill to declare it to be the law; and even had it not been ſo, he was ready to agree to the paſſing a bill that would evidently tend to ſtrengthen the hands of government, and put an end to ſuch libels as were otherwiſe to be expected againſt the peace and happineſs of the country.

The Houſe divided on the queſtion of commitment.

| | | |
|---|---|---|
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| Majority for the bill | | 25 |

The bill was ordered to be committed.

HOUSE

# HOUSE OF LORDS.

FRIDAY, *June* 1, 1792.

THE order of the day for the Houſe to reſolve itſelf into a committee on this bill having been moved and read, the Lord Chancellor left the woolſack, and Lord Cathcart took his ſeat at the table.

The firſt clauſe that follows the preamble having then been read a firſt time, the Lord Chancellor ſaid, before the clauſe was read a ſecond time, he wiſhed to ſubmit to their lordſhips the neceſſity of ſo amending the bill as to make it conformable to what its principle, if any principle it had, pretended to be. His lordſhip then went into a long argument, in which he elaborately contended for the doctrines he had ſtated in the former debate on the ſecond reading of the bill, juſtified the learned judges for the opinions they had delivered, aſſerted that the bill would go out of the Houſe, a parliamentary condemnation of the opinions and rules of practice which they had entertained and acted upon in purſuance of the example of their anceſtors, who had for ages entertained and acted upon the ſame; and that the effect of the bill, with reſpect to them, would be

the ſending them down to their circuits this ſummer, to put the king's proclamation in force, loaded with the reproach of having miſtaken and miſapplied the law of England with reſpect to libels, and a variety of other analogous points of legal diſpute that came before them.

Having put this ſtrongly, his lordſhip diſcuſſed the diſtinction between the doctrines of law which he had ever been taught to believe to be ſound doctrines, and thoſe inſiſted on by the ſupporters of the bill. He cited precedents from the law books; put the caſe of the trial of *an aſſumpſit*, as he had done before; and recapitulated the whole of the arguments that had been urged by Lord Kenyon and himſelf in the courſe of the debate. In the mention of the caſe of Owen, he ſaid, Mr. Ford, a lawyer of high character and great ability, had lent himſelf ſo wholly to his client, that he addreſſed the jury in an extraordinary manner, and inſiſting that the fact and certain other points were abſolutely neceſſary to be proved, which every profeſſional man knew were not neceſſary to be proved at all, the jury found a verdict of *Not Guilty*; on which the judge aſked, if they did not believe that the fact was proved? when the jury, aſhamed to confeſs that they did not, ſaid their verdict was *Not Guilty*, and that verdict they would abide by.

His lordſhip ſaid, he was unfortunately old enough

enough to remember that trial, though not then at the bar, and he well recollected, that the conduct of Mr. Ford was in Weſtminſter Hall univerſally reprobated. In particular, in a converſation which he had held at the time with Mr. Wilmot, afterwards chief juſtice Wilmot, and another counſel of eminence, they ſhook their heads, and expreſſed ſurpriſe that a man ſo converſant in law as Mr. Ford ſhould have conſented ſo to influence a jury. In the courſe of his ſpeech his lordſhip termed the arguments that had been advanced in oppoſition to thoſe uſed by himſelf and Lord Kenyon, very extraordinary arguments.

He made obſervations upon ſeveral parts of them, and particularly took notice of Lord Loughborough's declaration, That *libel* was an undefined word, not known by the criminal laws as a technical term, and always explained by an innuendo, as *ſeditious*, *falſe*, *ſcandalous*, &c. The Lord Chancellor ſaid, he was a little ſurpriſed at this, as Lord Coke both deſcribed and defined it. *Libel*, according to Lord Coke, was an abridged tranſlation from the Latin *libellus famoſus*, meaning *ſcriptura famoſa*, or writing fixing an imputation of a ſcurrilous ſort upon another man. His lordſhip contended, that even if libel had been a word of art or technical term not mentioned in an indictment or information, that amounted to nothing; as in the caſe of *larceny*, every man knew what

larceny meant, and yet the word larceny never appeared in an indictment.

Having laid conſiderable ſtreſs on this reply, his lordſhip ſaid, as the bill ſtood at preſent, it was negative merely, and only directed the judge what he ſhould *not* do; whereas, to make out its principle, it ought either to declare or enact what *he ſhould do*, and not leave him at a loſs as to the duty that was expected at his hands. Their lordſhips, he inſiſted on it, were bound, ſince they took upon them to give new powers to juries, to inſtruct the judges how they ought to act; and therefore, on the mere ground of making the bill conſiſtent, he moved that the words "that the judge ſtate to the jury the *legal* effect of the record" be inſerted in the clauſe.

LORD LOUGHBOROUGH

Said, he had liſtened with the utmoſt attention to all that had fallen from the noble and learned lord, but could find nothing more in his ſpeech than a repetition of arguments, references to caſes, &c. which had been ſtated, and replies to them at leaſt attempted to be given, in the preceding ſtage of the bill, when its principle was properly the ſubject of diſcuſſion, and when it had been very fully and at great length debated; excepting a few obſervations on what had fallen from ſeveral

noble lords who had ſpoken in the debate, after the noble and learned lord on the woolſack had ſat down, and from himſelf eſpecially.

Having taken the liberty of intruding upon a conſiderable portion of their lordſhips' time in the former debate, and delivering his ſentiments very much at large, he could not but regard it as a meaſure of great impropriety, conſidered as with reſpect to himſelf, were he again to enter into a diſcuſſion of arguments, that not only did not refer to the ſtage of the buſineſs in which they then were, but which had been fully diſcuſſed already. He ſhould not therefore ſay one word to far the greater part of the noble and learned lord's ſpeech. As to the preſent amendment, the only meaning of the words that he knew of, was to give back to the judge that right and authority to direct a jury, and take the framing of their verdict into his own hands, which it was the principle of the bill to take from him. If it meant no more than to introduce a clauſe, ſtating that to be the duty of the judge, which was already the duty of the judge in all caſes to do, viz. to ſtate to the jury what the law was, and to let them apply it to the fact, it was ſuperfluous; becauſe, although in his opinion, his lordſhip ſaid, it had been perfectly unneceſſary to enact it, a proviſion was made for it in the very next clauſe.

## The Lord Chancellor

Explained, and Lord Loughborough replied

### Lord Kenyon

Said, unfortunately in the late debate he had given offence, where he had not intended the leaſt offence in thought, word, or act, and had received a rebuke from a quarter, whence he, from his habits of life, leaſt of all expected one. He hoped therefore that he ſhould not again fall into a ſimilar error; but he deſired to know, how he was to act when ſuch and ſuch cases came before him as a judge. His lordſhip ſtated particular actions, and ſubjects of civil and criminal litigation.

### Earl Camden

Said, nothing could be more diſorderly than to go back to the principle of the bill, and to refer to former debates. It was a practice that ought never to obtain, and he would endeavour to avoid it. He roſe merely to expreſs his aſtoniſhment at the ſpeech of the noble and learned lord who ſat near the noble lord who had ſpoken laſt (the Lord Chancellor), which had conſiſted of a variety of arguments, that had been replied to ſo fully on preceding diſcuſſions of the bill.

He

He muſt contend, that the jury had an undoubted right to form their verdict themſelves according to their conſciences, applying the law to the fact; and if it were otherwiſe, he ſaid, the firſt principle of the law of England would be defeated and overthrown. If the twelve judges were to aſſert the contrary again and again, his lordſhip declared he would deny it utterly, becauſe every Engliſhman was to be tried *by his country*; and who was *his country* but his twelve peers, ſworn to condemn or acquit according to their conſciences? If the caſe were otherwiſe, and the oppoſite doctrine were to obtain, trial by jury would be a *nominal* trial, a mere form; for, in fact, the judge and not the jury would try the man.

His lordſhip ſaid, he would contend for the truth of this argument to the lateſt hour of his life *manibus pedibuſque*. With regard to the judge ſtating to the jury what the law was upon each particular caſe, it was his undoubted duty ſo to do; but, having done ſo, the jury were to take both law and fact into their conſideration, and to exerciſe their diſcretion and diſcharge their conſciences. With regard to an *action* for a libel, the caſe, his lordſhip ſaid, was there ten times ſtronger; for, on an action, damages were laid in the declaration; and how could a jury, as honeſt men, give damages, if they did not take the whole

of the caſe into their conſideration? Upon what other principle could they poſſibly decide?

As to the doubts ſtarted by the noble and learned lord who preſided over the court of King's Bench, his lordſhip proteſted he had endeavoured to examine the matter deeply and cloſely, and he could not perceive the ſmalleſt difficulty, nor where a judge could poſſibly meet with any. With reſpect to the amendment propoſed by the noble and learned lord from the woolſack, it ſtruck him as an attempt indirectly to convert the bill into the very oppoſite of what it was intended to be, and to give judges a power ten times greater than they had ever yet exerciſed.

The MARQUIS of LANSDOWNE

Said, he roſe not to enter into a reviſion of what had been amply debated, and after full diſcuſſion determined by a majority of their lordſhips, on a former day, nor did he mean to go back to any expreſſions of a perſonal nature that might have fallen in the courſe of a preceding debate. With reſpect to the former, he had little encouragement to do ſo, even if it were regular and orderly, after their lordſhips had heard the debate, and ſeen two great and eminent law lords, oppoſed to two other law lords equally high in profeſſional rank and character, riſe again and again, and declare, that they were ſo perfectly puzzled with the arguments

of

of each other, that they could not comprehend what they meant.

With regard to what a noble and learned lord had ſaid, at the beginning of his ſpeech, with relation to a rebuke he had received in a former debate; as he had not explained to what expreſſions he alluded, it was impoſſible for him to gueſs, whether the noble and learned lord referred to any part of the ſpeech of a noble earl near him (Lord Stanhope), or to any expreſſions that might have fallen from him. If he alluded to him, he muſt ſay, the noble and learned lord had miſconceived him moſt groſsly. In what he had ſaid, he had meant nothing perſonal, but had applied his obſervations to the profeſſion and the office of the noble lord, not to him individually and in his perſonal capacity. He had ſaid nothing warm, till he had been moſt irkſomely interrupted from a quarter, from which he might well ſay his conduct on more than one occaſion (which he could not then go into) well entitled him to a patient hearing. He had ever conſidered the law as a great and reſpectable profeſſion, but as a profeſſion to be looked at with caution and jealouſy, and to be guarded againſt.

As to the amendment propoſed by the noble and learned lord on the woolſack, it conſiſted, to ſay the leaſt of it, in words of *ſuperabundance*, and was by no means neceſſary. It was, he ſaid, the practice

practice of lawyers to multiply words, and to introduce them without apparent preſent occaſion, in order that advantage might be taken of them at a ſubſequent period, and a conſtruction be put upon them which had never been dreamt of at the moment when they were introduced. The words of the amendment, as the noble and learned lord at the head of his majeſty's councils had well ſtated, either meant ſomething miſchievous, and contradictory to the principle of the bill, or they meant nothing: if the former, they were inapplicable; if the latter, they were unneceſſary. He ſpoke, his lordſhip ſaid, as a man of plain ſenſe, and as an *unlearned* man. That Houſe was a houſe not of lawyers, but of lay lords, and was fully competent to comprehend as much of law as was level to a plain underſtanding.

The conſtitution of England, he muſt remind their lordſhips, required no more from them. Juries alſo, who were to enforce the law, and to acquit or condemn their fellow ſubjects according to law and their conſciences—they were likewiſe *unlearned* men. He knew it to be the practice of lawyers to wrap up miſchievous meanings in forms of words; and it was the duty of their lordſhips, as a branch, and an important branch, of the legiſlature, to guard againſt it. He for one, the marquis ſaid, ſtood there as a truſtee for the people of England, inaſmuch as their rights were implicated

plicated in his own: and if ever there ſhould ariſe a conteſt between the great lawyers of that Houſe and the people of England, the people of England ſhould always find him ready to ſtand up as their advocate, and to defend their rights.

His lordſhip repeated what he had before aſſerted, viz. that, in what had fallen from him in a former debate, he meant no perſonal offence whatever, but directed what he had ſaid ſolely at the office and profeſſion of the noble and learned lord; and he concluded his ſpeech with ſaying, that the liberties of this country depended, however unfaſhionable the phraſe, on an *unlearned* Houſe of Lords, and an *unlearned* judicature.

LORD PORTCHESTER,

In a ſhort ſpeech, argued upon the neceſſity and propriety of the amendment, and contended that it was inapplicable, as it would operate to reverſe the principle of the bill.

EARL STANHOPE

Roſe to call the attention of the committee to the words of the amendment, and, by a reference to the next clauſe, proved that they were unneceſſary. His lordſhip alſo noticed what had fallen from Lord Kenyon; and ſaid, if the noble and learned

learned lord had alluded to any part of his ſpeech in a former debate, he could only ſay, he had meant no perſonal offence; that whenever he heard what he conceived to be an erroneous opinion, he would ſtate the error of that opinion, and do his duty by detecting fallacy wherever he diſcovered it.

The amendment moved by the LORD CHANCELLOR was rejected, and the reſt of the bill gone through and agreed to, without further amendment.

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## HOUSE OF LORDS.

MONDAY, *June* 11, 1792.

THE queſtion having been put for the third reading of this bill,

EARL BATHURST

Expreſſed his diſapprobation of it, and his hope that it would be remembered that he had given it his moſt decided negative.

The bill was then read a third time, and agreed to.

PROTEST

# PROTEST

*Againſt paſſing of the* BILL "To remove Doubts reſpecting the Functions of Juries in Caſes of Libel."

DISSENTIENT,

1ſt, Becauſe the rule laid down by the bill, contrary to the determination of the judges and the unvaried practice of ages, ſubverts a fundamental and important principle of Engliſh juriſprudence, which, leaving to the jury the trial of the fact, reſerves to the court the deciſion of the law. It was truly ſaid by Lord Hardwicke, in the court of King's Bench, that if ever theſe came to be confounded, it would prove the confuſion and deſtruction of the law of England.

2dly, Becauſe juries can in no caſe decide, whether a matter of record be ſufficient upon which to found judgment. The bill admits the criminality of the writing ſet forth in the indictment, or information, to be matter of law whereupon judgment may be arreſted, notwithſtanding the jury had found the defendant guilty. This ſhews that the queſtion is upon the record, and diſtinctly ſeparated from the province of the jury, which is only to try facts.

3dly, Becauſe, by confining the rule to an indictment,

dictment, or information, for a libel, it is admitted that it does not apply to the trial of a general iſſue, in an action for the ſame libel, or any ſort of action, or any other ſort of indictment, or information: but as the ſame principle and the ſame rule muſt apply to all general iſſues, or to none, the rule as declared by the bill is abſolutely erroneous.

THURLOW, C.
BATHURST.
KENYON.
ABINGDON.
WALSINGHAM.
JOHN BANGOR.

THE

# THE STATUTE

## 32 Geo. III. c. 60.

An Act to remove Doubts reſpecting the Functions of Juries in Caſes of Libel.

WHEREAS doubts have ariſen, whether, on the trial of an indictment or information for the making or publiſhing any libel, where an iſſue or iſſues are joined between the king and the defendant or defendants, on the plea of Not Guilty pleaded, it be competent to the jury impanelled to try the ſame to give their verdict upon the whole matter in iſſue: Be it therefore declared and enacted by the king's moſt excellent majeſty, by and with the advice and conſent of the lords ſpiritual and temporal, and commons, in this preſent parliament aſſembled, and by the authority of the ſame, That, on every ſuch trial, the jury ſworn to try the iſſue may give a general verdict of Guilty or Not Guilty upon the whole matter put in iſſue upon ſuch indictment or information; and ſhall not be required or directed, by the court or judge before whom ſuch indictment or information ſhall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by ſuch defendant or defendants of the paper charged to be a libel, and of the ſenſe aſcribed to the ſame in ſuch indictment or information.

II. Pro-

II. Provided always, that, on every ſuch trial, the court or judge before whom ſuch indictment or information ſhall be tried, ſhall, according to their or his diſcretion, give their or his opinion and directions to the jury on the matter in iſſue between the king and the defendant or defendants, in like manner as in other criminal caſes.

III. Provided alſo, that nothing herein contained ſhall extend, or be conſtrued to extend, to prevent the jury from finding a ſpecial verdict, in their diſcretion, as in other criminal caſes.

IV. Provided alſo, that in caſe the jury ſhall find the defendant or defendants guilty, it ſhall and may be lawful for the ſaid defendant or defendants to move in arreſt of judgment, on ſuch ground and in ſuch manner as by law he or they might have done before the paſſing of this act; any thing herein contained to the contrary notwithſtanding.

FINIS.